Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-377

RICHARD I. LUDWIG, Appellant

vs.

MASSACHUSETTS, Appellee

ON APPEAL FROM THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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vs.

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Appellant appeals from the decision of the Supreme Judicial Court of Massachusetts, entered on June 12, 1975, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in the Massachusetts Advance Sheets p.1194 (1975) and at 330 N.E. 2d 467. A copy of the opinion is set out in the appendix to this jurisdictional statement at p.1a.

JURISDICTION

The judgment upon which this appeal is taken was rendered on June 12, 1975, by the Supreme Judicial Court and notice of appeal was filed in the Supreme Judicial Court on September 3, 1975. The jurisdiction of the Supreme Court to review the decision of the Supreme Judicial Court on direct appeal is conferred by 28 U.S.C. Sec. 1257(2).

Section 1257(2) is specifically invoked by appellant as the constitutionality of Massachusetts' statutory two-tier trial de novo criminal procedure was held not to be repugnant to the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The statutory procedure is comprised of Article XII of the Massachusetts' Declaration of Rights [1] which provides

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[1] For purposes of Sec.1257(2) a provision of a state constitution is equivalent to a state "statute", Railway Express Agency v. Virginia, 282 U.S. 440.

that no person "shall be... deprived of his ... liberty ... but by the judgment of his peers"; G.L. Ch. 218 Sec. 26 conferring jurisdiction on the courts in the first tier of the system; G.L. Ch. 278 Secs. 18, 18A, providing a right of appeal to the various courts in the second tier, and a right to trial by a jury of six or twelve.[2] This procedure has been construed by the Supreme Judicial Court to mean that an accused is to be tried initially in a district court which comprises a judge and that he shall have a right to a trial by jury by claiming an "appeal" to the

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[2] From a conviction in certain district courts in the first tier, a defendant may "appeal" pursuant to G.L.Ch. 278 Sec. 18, Ch. 218 Sec. 27A, to the six-man jury division of the district courts or to the superior court where he may obtain a trial by jury of twelve pursuant to G.L.Ch. 278 Sec. 2. From a conviction of the Municipal Court of Boston or of a district court of Boston, an accused may "appeal" pursuant to G.L.Ch.278 Sec.18A to the twelve-man jury division of the Municipal Court of Boston, or to the superior court where he is also guaranteed a twelve-man jury pursuant to G.L.Ch.278 Sec.2.

second tier of the Massachusetts system. See Jones v. Robbins, 8 Gray 329, 341-342 (1858).[3]

QUESTIONS PRESENTED

1. Is Massachusetts bound by the rule of Callan v. Wilson, 127 U.S. 540 (1888) guaranteeing a defendant a trial by jury in the first instance when charged with an offense carrying a possible maximum jail sentence in excess of six months?

2. Where a defendant is entitled to a trial by jury, does the interposition of a trial by magistrate impose an unconstitutional burden on the Sixth Amendment right to a speedy trial?

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[3] In particular, G.L. Ch. 218 Sec. 26 confers "original jurisdiction" to the district courts over certain crimes. The term "district court" means a court in which only a judge presides. Compare this statute with its partial ancestor St. 1858 Ch. 448 Sec. 1 which conferred jurisdiction to "police courts" over larceny not exceeding $50. "Police court", as was noted by Chief Justice Shaw in Jones v. Robbins, supra, at p.336, simply meant a "court [that] sits without a jury". (St. 1858 Ch. 448 Sec. 1 is set in full in Jones at pp. 336, 354.)

3. Where the Sixth Amendment guarantees a trial by jury, do state two-tier de novo procedures which deny this right in the first instance violate the double jeopardy provisions of the Fifth Amendment?

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution; Massachusetts General Laws Ch. 218 Secs. 26, 27A, Ch. 278 Secs. 2, 18, 18A, and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the appendix at p 4a.

STATEMENT OF THE CASE

Richard I Ludwig was charged in the District Court of Northern Norfolk with driving an automobile negligently so that the lives and safety of the public were endangered, a criminal offense set out in G.L.Ch. 90 Sec. 24(2)(a) carrying a possible maximum two-year jail sentence. At the commencement of his trial, Richard I. Ludwig duly moved the district court judge for a speedy jury trial, specifically asserting his rights under the Fifth and Sixth Amendments. The judge denied this motion, and after a trial, found Richard I. Ludwig guilty of the offense charged.

Thereupon, Richard I. Ludwig claimed an "appeal" for a trial de novo in District Court of Northern Norfolk Six-Man Jury pursuant to G.L. Ch. 278 Sec. 18 and Ch. 218 Sec. 27A.

In the de novo proceedings, appellant duly filed a "motion to dismiss" on the grounds that he was denied a jury trial in the first instance. This motion was denied and appellant took an exception pursuant to G.L. Ch. 278 Sec. 30. After being found guilty and sentenced to pay a $20 fine, payment of which was stayed, appellant filed a bill of exceptions to the Supreme Judicial Court pursuant to G.L. Ch. 278 Sec. 30 alleging that the denial of his "motion to dismiss" was error. The Supreme Judicial Court overruled appellant's exception.

The federal questions underlying this appeal were raised in the first instance by appellant at his trial in the District Court of Northern Norfolk by his motion for a speedy jury trial, and in the District Court of Northern Norfolk Six-Man Jury by his "motion to dismiss" as defined in Whitmarsh v. Commonwealth, Mass. Adv. Sh. (1974), 1403, 316 N.E. 2d, 610, 613 (1974). See also Costarelli v. Massachusetts, ___ U.S. ___, 95S. Ct. 1534. Copies of both motions are set out in the appendix at pp. 13a, 14a.

The federal issues were raised in the Supreme Judicial Court upon appellant's bill of exceptions. In its decision the Supreme Judicial Court held that "the

claimed infractions of constitutional rights – the right to a speedy trial under the Sixth Amendment, the right to a jury trial under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights, and the guaranty against double jeopardy under the Fifth Amendment" were properly before the court. The court then passed on the claims and held them "untenable", — "We have suffered no change of mind on the constitutional issues since the Whitmarsh decision."[4]

THE QUESTIONS ARE SUBSTANTIAL

1. The first tier of the Massachusetts' two-tier de novo criminal procedure is comprised of the district courts and the Municipal Court of Boston. These courts have jurisdiction over all crimes carrying a possible prison sentence of five years or less, and certain enumerated felonies having possible maximum prison sentences in excess of five years.[5] Criminal proceedings in these courts are commenced by the issuance of a complaint. If the defendant pleads guilty at arraignment, he is sentenced by the presiding judge. If he is dissatisfied by the sentence, he may "appeal"[6] the issue of

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[4] The decision of the Supreme Judicial Court in effect incorporated the decision in Whitmarsh.

[5] G. L. Ch. 218 Sec. 26.

[6] G.L. Ch. 278 Secs. 18 and 18A.

his sentence to a court in the second tier in the de novo procedure, but he is not entitled to a de novo trial in the second tier on the issue of his innocence or guilt, Commonwealth v. Crapo, 212 Mass. 209, 210 (1912).

If the defendant pleas not guilty in the district court or Municipal Court of Boston, he must stand trial before a judge. He cannot obtain a trial by jury as the lower court "sit without jury". If he is convicted in certain district courts, he has a right of "appeal" to the superior court where he may obtain a de novo trial by jury[7] or to the Six-Man Jury division of the district court.[8] If he is convicted in a district court of Boston or the Municipal Court of Boston, he may "appeal"[9] to the superior court for a de novo trial by a jury of twelve, or alternatively to the twelve-man jury division of the Municipal Court of Boston.[10]

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[7] G.L. Ch. 278 Secs. 2, 18.

[8] G.L. Ch. 278 Sec. 18 and Ch. 218 Sec.27A.

[9] G.L. Ch. 278 Secs. 2, 18A.

[10] Hence, the second tier of the Massachusetts system is comprised of the superior court, the six-man jury division of the district courts, and the twelve-man jury division of the Municipal Court of Boston.

If a defendant fails to "prosecute his appeal [in the second tier], he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court," G.L. Ch. 278 Sec. 24. (emphasis added)

In reviewing this two-tier de novo procedure in Jones v. Robbins, 8 Gray 329, 341 (1858), the Supreme Judicial Court held that it did not violate Article XII of the Declaration of Rights of the Massachusetts Constitution guaranteeing that no law "shall subject any person to ... infamous punishment ... without trial by jury", which words Chief Justice Shaw stated were "equivalent" to the clause -- "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" -- in the Sixth Amendment. However, thirty years later in Callan v. Wilson, supra, at 553-4, Justice Harlan took note of Jones v. Robbins and rejected its reasoning at page 556-7 by holding that the Sixth Amendment guarantee to a trial by jury meant trial by jury in the first instance: "Except in that class or grade of offenses called petty offenses, ... the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial

for the offense charged." This decision, of course, only affected the two-tier de novo procedure in the District of Columbia and was not binding on Massachusetts prior to the decision by this Court in Duncan v. Louisiana, 391 U.S. 145 (1968).

In Duncan at p. 149, this Court held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee", and hence inferentially bound the states to the rule of Callan v. Wilson, supra. In particular see Duncan at p. 148 ftn. 30, 181, 182, ftn. 21, 213. Following Duncan, this Court held in Baldwin v. New York, 399 U.S. 66 (1970), that the states were bound to afford an accused a trial by jury with respect to all crimes carrying a maximum prison sentence in excess of six months.

Subsequent to Duncan and Baldwin, state and lower federal courts have rendered conflicting opinions as to whether the conjunctive effect of Duncan and Baldwin bound the states to the rule of Callan v. Wilson. A unanimous Supreme Court of Rhode Island answered the question in the affirmative in Holliday v. State, 109 R.I. 93, 103 (1971) — "We hold, then, that those charged with misdemeanors that could result, upon conviction, in the imposition of a sentence of more than six months are entitled to a speedy

and prompt trial by an impartial jury in the first instance." The Supreme Court of Virginia reached the opposite conclusion in Manns v. Commonwealth, 213 VA. 2nd 233 (1972) holding that Mr. Justice White's footnote 30 in Duncan "makes it clear" that the question of "incorporation" was an "open" one.[11] To the same effect, see Walker v. Dillard, 363 F. Supp. 921 (W.D.V. 1973).

In Whitmarsh v. Commonwealth, ___ Mass. ___, 316 N.E. 2d 610, 618-619, the Supreme Judicial Court held that the "state of the law on the subject is highly uncertain" and therefore it was not "required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance ..., or (b) that even if that court did reaffirm this rule ... with respect to the Federal Courts, it would apply such a requirement in equal fashion to the states." In other state jurisdictions, the issue is undecided. See ftn. 9 and 10 in Colten v. Kentucky, 407 U.S. 514 (1972) citing Massachusetts, North Carolina, Pennsylvania. Cf. Lemieux v. Robbins, 414 F2d 353, 355 ftn. 3 (1969), cert. denied, 397 U.S. 1017 (1970), noting the two-tier procedure in Maine. See also D. Non-Jury Trial for Misdemeanors Subject to De Novo Review, Appendix to opinion of Justice Harlan, Williams v. Florida, 399 U.S. 78, 141 (1970).

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[11] Cf. Manns v. Koontz, 451 F.2d 1345 (4th cir. 1971).

2. A second issue presented by this appeal is whether the imposition of a trial without jury is an unconstitutional burden on the defendant's right to a speedy trial and violates the double jeopardy provisions of the Fifth Amendment. The two-tier trial de novo procedure is totally counter-productive to minimizing the "anxiety and concern of the accused", Barker v. Wingo, 407 U.S. 514, 532 (1972), one of the main purposes of a speedy trial guarantee. For the defendant who chooses not to disclose his defense, a trial in the district court is a meaningless proceeding. A conviction and "appeal" from a district court trial generates a "cloud of anxiety, suspicion and often hostility", Barker v. Wingo, supra, and United States v. Marion, 404 U.S. 307, 321 (1971), and shifts the burden, in violation of the Fifth Amendment, to the defendant to prosecute his "appeal" to prove his innocence, G.L. Ch. 278 Sec. 24. See Holiday v. State, supra, at page 103, alternatively holding that two-tier trial de novo procedures violate the speedy trial provisions of the Sixth Amendment.

Similarly, the two-tier trial de novo system inherently violates the underpinnings of the double jeopardy provisions of the Fifth Amendment — "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and com-

pelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty", United States v. Green, 355 U.S. 184, 187-188 (1957)

Implicit in limiting "the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", United States v. Jorn, 400 U.S. 470 (1971), is limiting it to a single proceeding which comports with constitutional standards, and it is no answer on the part of States to eventually offer the defendant a constitutional de novo adjudication, Ward v. Village of Monroeville, 490 U.S. 57, 61-62 (1972).

Since the above issues effect the administration of criminal justice in at least ten states, and since there is a conflict between at least two of these, it is submitted that the questions presented by this appeal are substantial and of public importance.

CONCLUSION

Appellant maintains that the decision of the Supreme Judicial Court was error in that it denied him his fundamental right to a speedy jury trial under the Sixth Amendment to the United States Constitution. Accordingly, he submits that the questions presented by this

appeal are so substantial to require plenary consideration for their resolution.

Respectfully submitted,

Robert W. Hagopian, Esq.
Counsel for Appellant

COMMONWEALTH

VS.

RICHARD I. LUDWIG

Supreme Judicial Court of Massachusetts, Norfolk.

Argued April 9, 1975

Decided June 12, 1975

Robert W. Hagopian, Wrentham, for defendant.

Paul S. Zonderman, Sp. Asst. Dist. Atty., for the Commonwealth.

Before TAURO, C.J., and BRAUCHER, HENNESSEY, KAPLAN and WILKINS, JJ.

KAPLAN, Justice.

This is one of a series of cases in which the defendant's counsel, representing a number of clients, has sought to test the constitutionality of the Commonwealth's "two-tier" or "trial de novo" system,[1] a procedure by which those ac-

1. See the listing of such cases in Whitmarsh v. Commonwealth, ___ Mass. ___, 316 N.E.2d 610, fn.4 (1974) (Mass.Adv.Sh. [1974] 1403, 1408-1409, fn.4). Costarelli v. Municipal Court of the City of Boston, ___ Mass. ___, 323 N.E.2d 859, fn.3 (1975) (Mass.Adv.Sh.[1975] 481, 487-488, fn.3). See also a connected case, Costarelli v. Massachusetts, ___ U.S. ___, 95 S.Ct. 1534, 44 L.Ed.2d 76 (1975).

cused of certain offenses may be tried first in a District Court without a jury, and, if convicted there, may secure a fresh trial, to a jury, at the next higher court level. See G.L.c.278, §18.

We need to refer here to one of the prior proceedings. In Whitmarsh v. Commonwealth, ___ Mass. ___,[a] 316 N.E.2d 610 (1974), Whitmarsh was tried in a District Court on a charge of operating a motor vehicle while under the influence of intoxicating liquor; he moved at the outset for trial by jury; the motion was denied. On trial he was found guilty. He appealed to the Superior Court where he would be entitled to a trial de novo with a jury. He moved in that court to dismiss, insisting on the invalidity of the procedure from the start. Pending decision of the motion, he filed a so called "interlocutory appeal" in this court for Suffolk County asking a declaration that the two-tier system was unconstitutional, and an injunction against further prosecution of the criminal charge. A single justice of this court denied the injunction and reserved and reported the case. We held that the "interlocutory appeal" could not be maintained, and we declined exercise of extraordinary power under our superintendency statute, G.L. c.211, §3. But "in view of the nature of the question which . . . [Whitmarsh] attempted to raise and in view of the fact that . . . [Whitmarsh's] counsel appears determined to raise the same question in other cases" (id. at ___,[b] 316 N.E.2d at 614, we undertook to state our opinion on the claimed infractions of constitutional rights— the right to a speedy trial under the Sixth Amendment, the right to jury trial under the Sixth Amendment and art.12 of the Massachusetts Declaration of Rights, and the guaranty against double jeopardy under the Fifth Amendment. We held each of these claims to be untenable. Id. at ___ - ___,[c] 316 N.E.2d 610.

In holding that the "interlocutory appeal" was not available, we indicated how a final decision might be obtained that would be subject to regular appellate review. We said, "If his motion were denied [i.e., Whitmarsh's motion in the Superior Court to dismiss], and if he were thereafter tried in the Superior Court and found guilty . . . [Whitmarsh] would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto." (Id. at ___,[d] 316 N.E.2d at 613). Counsel followed that line in the present case. Here the defendant Ludwig, charged in the District Court of Northern Norfolk with driving to endanger (G.L.c.90 §24[2][a], moved for a jury trial which the judge denied; the defendant was then found guilty. In the de novo proceeding in the District Court of Northern Norfolk, Six Man Jury Session (similar for present pur-

[a] Mass.Adv.Sh. (1974) 1403.

[b] Mass.Adv.Sh.(1974) at 1408-1409.

[c] Mass.Adv.Sh. (1974) at 1408-1418.

poses to a de novo proceeding in the Superior Court, see G.L. c.278, §18), the defendant moved to dismiss, claiming among other things that the court lacked "jurisdiction" because of the improper refusal of a jury at first instance. The motion was denied over due exception and the defendant was fined $20. Imposition of sentence was stayed, and the case is before this court on a bill of exceptions, as amended, which in effect raises again the constitutional claims.

The case is properly here for review. The attack on "jurisdiction" is but a flourish, and add nothing to the constitutional points above mentioned which the defendant's counsel has been pressing with repetitious insistence. We have suffered no change of mind on the constitutional issued since the Whitmarsh decision.

Exceptions overruled.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH, AT BOSTON

IN THE CASE OF June 12, 1975.

COMMONWEALTH

vs.

RICHARD I. LUDWIG

pending in the District Court of Northern Norfolk for the County of Norfolk, Nos. 4157, 4158 and 4159

ORDERED, that the following entry be made in the docket; viz.,—

Exceptions overruled.

By the Court,
William M. Cloran, Asst. Clerk.

June 12, 1975

Brief statement of the grounds and reasons of the decision:

See opinion on file.

APPENDIX

Article XII of the Massachusetts Declaration of Rights:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

G.L. CH. 218 Sec. 26

District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for

money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven. Amended by St.1958, c. 138; St.1962, c. 722, §8; St.1964, c. 140; St.1969, c. 496; St.1973, c. 585.

G.L. CH. 278 Sec. 18

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid.

The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A. Amended by St.1973, c. 657.

Massachusetts General Laws, Chapter 278, Section 18A:

[Trial of misdemeanors in Suffolk county or in municipal court of Boston]

Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve in

the municipal court of the city of Boston has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has, and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicable to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly by the supreme judicial court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.

BEST COPY AVAILABLE

Massachusetts General Laws Chapter 218, Section 27A:

[Trial by jury of six in certain courts]

Any defendant in a district court of Berkshire county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Central Berkshire.

Any defendant in a district court of Bristol county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the second or third district court of Bristol.

Any defendant in a district court of Essex county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of Essex or the central district court of northern Essex.

Any defendant in a district court of Hampden county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Springfield.

Any defendant in the first district court of northern Middlesex, the fourth district court of eastern Middlesex or the district court of Lowell found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Lowell.

Any defendant in the district court of Marlborough, the district court of Natick, first district court of southern Middlesex, the district court of central Middlesex or the second district court of eastern Middlesex found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of southern Middlesex.

Any defendant in the first district court of eastern Middlesex, the third district court of eastern Middlesex, the district court of Somerville, or the district court of Newton, found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the third district court of eastern Middlesex.

Any defendant in a district court of Norfolk county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of northern Norfolk or the district court of East Norfolk.

Any defendant in a district court of Plymouth county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Brockton.

Any defendant in a district court of Worcester county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the central district court of Worcester.

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

BEST COPY AVAILABLE

Any defendant found guilty in any of said district courts, of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a waiver of any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of the superior court has any may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases The chief justice of the district

courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

G.L. CH. 278 Sec. 20

Upon such appeal, the clerk of the district court shall transmit to the clerk of the superior court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

G.L. Ch. 278 Sec. 2

Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury drawn and returned in the manner provided for the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

NORFOLK, ss DISTRICT COURT OF NORTHERN NORFOLK

COMMONWEALTH OF MASSACHUSETTS

VS.

RICHARD I. LUDWIG

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, Callan v. Wilson, 117 U.S. 540, Duncan v. Louisiana, 391 U.S. 145, ftn. 30; and a right guaranteed by the speedy trial provision of the Sixth Amendment, Klopfer v. North Carolina, U.S. , Holliday v. State, 280 A 2d 333; and a right guaranteed under the double jeopardy provisions of the Fifth Amendment, Benton v. Maryland, 89 S.Ct. 2056, United States v. Jorn, 400 U.S. 470.

By his attorney,

(s) ROBERT W. HAGOPIAN

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS DISTRICT COURT OF
NORTHERN NORFOLK
SIX MAN JURY
No. 4157-9

COMMONWEALTH

v

LUDWIG

MOTION TO DISMISS

Now comes the defendant in the above entitled action and says:

1. On March 11, 1974, he was charged in the District Court of Northern Norfolk on the above entitled complaints;

2. at the beginning of the proceedings he moved the court for a trial by jury in the first instance, asserting his Sixth Amendment right to a speedy trial by jury in the first instance. A copy of said motion is attached and made a part hereof.

3. The district court denied said motion.

4. The defendant was found guilty.

Wherefore, the defendant alleges that his conviction in the district court was void for being incontravention to the Constitution of the United States, Callan v. Wilson, 127 U.S. 540, 556-7; Duncan v. Louisiana, 391 U.S. 145, 158 ftn. 30, 181, 182 ftn. 21, 213; Holliday v. State, 380 A.2d 323; and as such the district court lack jurisdiction, Jones v. Robbins, 8 Gray 329, 330. Additionally, this court also lacks jurisdiction as this court's appellate jurisdiction must be predicated

on the jurisdiction of the district court.

And the defendant further maintains that to try him a second time in these circumstances would violate the double jeopardy provisions of the Fifth Amendment to the Constitution, and the speedy trial provisions of the Sixth Amendment.

By his attorney,

(s) ROBERT W. HAGOPIAN

Robert W. Hagopian, Esq.
Wrentnam, Massachusetts 02093

4/5/74 Denied. Defendant's exception noted.

(s) VIROSTEK SJ

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

CRIMINAL NO.150 of 1974

COMMONWEALTH OF MASSACHUSETTS

VS.

RICHARD I. LUDWIG

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard I. Ludwig, the appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Judicial Court on Juhe 12, 1975. This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

By his attorney,

_____

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

CERTIFICATE OF SERVICE

Now comes Robert W. Hagopian, Esq., and certifies that he has served a copy of the above Notice of Appeal on John P. Connor, Jr., Esq., Assistant District Attorney, by mailing a copy of same first class, postage prepaid, to him at Norfolk Superior Court House, High Street, Dedham, Massachusetts 02026, on September 2, 1975.

_____

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

Supreme Court, U. S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1975

No. 75-377

Richard I. Ludwig, Appellant

v.

Massachusetts, Appellee

Appeal from the Supreme Judicial
Court of Massachusetts

Filed September 10, 1975

Probable Jurisdiction Noted
November 11, 1975

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1975

Richard I. Ludwig, Appellant

v.

Massachusetts, Appellee

Appeal from the Supreme Judicial
Court of Massachusetts

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The opinion of the Supreme Judicial Court is set out in the jurisdictional statement at p.1a.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 1, 1974 - Complaint #15338 filed in District Court of Northern Norfolk.

February 1, 1974 - Defendant arraigned, pleads not guilty, continued to 2/25/74.

February 25, 1974 - Continued 3/11/74.

March 11, 1974 - Motion for jury trial denied. Defendant found guilty, fined $20, and "appealed" to District Court of Northern Norfolk Six-Man Jury.

March 20, 1974 - Appeal #4157 entered in the District Court of Northern Norfolk Six-Man Jury.

April 5, 1974 - Defendant's Motion to Dismiss denied. Jury trial waived. Defendant found guilty, and fined $20. Payment of fine stayed.

April 22, 1974 - Defendant's Bill of Exceptions filed.

September 3, 1974 - Defendant's Amended Bill of Exceptions filed.

October 30, 1974 - Defendant's Amended Bill of Exceptions allowed.

December 27, 1974 - Defendant's Bill of Exceptions entered in Supreme Judicial Court #150 of 1974.

June 15, 1975 - Exceptions overruled by Supreme Judicial Court of Massachusetts. Rescript entered.

September 3, 1975 - Defendant's Notice of Appeal to the United States Supreme Court filed in the Supreme Judicial Court of Massachusetts.

September 10, 1975 - Defendant's appeal filed in the United States Supreme Court.

November 3, 1975 - Payment of fine stayed pending defendant's appeal to the Supreme Court.

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.

To the DISTRICT COURT OF NORTHERN NORFOLK, holden at Dedham within the County of Norfolk, for the transaction of criminal business.

Robert C. Dietenhofer of Dedham in the County of Norfolk in behalf of the Commonwealth of Massachusetts, on the 1st day of February in the year one thousand nine hundred and seventy-four, on oath complains that Richard I. Ludwig of Norwood in the County of Norfolk, on the 31st day of January in the year one thousand nine hundred and seventy-four, at Dedham in the County of Norfolk, did operate a motor vehicle negligently on a way there situate called Sanderson Avenue, so that the lives and safety of the public might be endangered against the peace of the said Commonwealth, and the form of the statute in such cases made and provided.

(s) ROBERT C. DIETENHOFER,
Complainant.

Commonwealth of Massachusetts

Norfolk, ss.

Taken and sworn to, the day and year first above written.

Before me,

(s) Asst. Clerk

Attest: (c) Asst. Clerk

Norfolk, ss. Dedham Feb. 1, 1974

I found the within-named defendant in the act of committing the offence within alleged, and arrested him for said offence without a warrant and now have him before the District Court of Northern Norfolk, holden at Dedham, aforesaid, for the transaction of criminal business.

(s) ROBERT C. DIETENHOFER
Police Officer of Dedham

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. District Court of Northern Norfolk Six-Man Jury #4157

COMMONWEALTH

V.

RICHARD I. LUDWIG

MOTION TO DISMISS

Now comes the defendant in the above entitled action and says:

1. On March 11, 1974, he was charged in the District Court of Northern Norfolk on the above entitled complaints.

2. At the beginning of the proceedings he moved the court for a trial by jury in the first instance, asserting his Sixth Amendment right to a speedy trial by jury in the first instance. A copy of said motion is attached and made a part hereof.

3. The district court denied said motion.

4. The defendant was found guilty.

Wherefore, the defendant alleges that his conviction in the district court was void for being incontravention to the Constitution of the United States, Callan v. Wilson, 127 U.S. 540, 556-7; Duncan v. Louisiana, 391 U.S. 145, 158 ftn. 30, 181, 182 ftn. 21, 213; Holliday v. State, 380 A.2d 323; and as such the district court lacked jurisdiction, Jones v. Robbins, Gray 329, 330. Additionally, this court also lacks jurisdiction as this court's appellate jurisdiction must be predicated on the jurisdiction of the district court.

And the defendant further maintains that to try him a second time in these circumstances would violate the double jeopardy provisions of the Fifth Amendment to the Constitution, and the speedy trial provisions of the Sixth Amendment.

By his attorney,

(s) ROBERT W. HAGOPIAN
Robert W. Hagopian, Esq.
Wrentham, Massachusetts
02093

AFFIDAVIT IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Now comes Robert W. Hagopian, who deposes and says that those facts set out in the above motion to dismiss are true and those statements of information and belief are believed to be true.

Signed under the pains and penalties of perjury.

(s) ROBERT W. HAGOPIAN
Robert W. Hagopian

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. District Court of
Norfolk #15338

COMMONWEALTH

V.

RICHARD I. LUDWIG

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, Callan v. Wilson, 117 U.S. 540, Duncan v. Louisiana, 391 U.S. 145, ftn. 30;

and a right guaranteed by the speedy trial provision of the Sixth Amendment, Klopfer v. North Carolina, U.S. , Holliday v. State, 280 A 2d 333; and a right guarnateed under the double jeopardy provisions of the Fifth Amendment, Benton v. Maryland, 89 Ct. 2056, United States v. Jorn, 400 U.S. 470.

By his attorney,

(s) ROBERT W. HAGOPIAN
Robert W. Hagopian, Esq.
Wrentham, Massachusetts
02093

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. District Court of
Northern Norfolk Six-
Man Jury #4157

COMMONWEALTH

V.

RICHARD I. LUDWIG

DEFENDANT'S AMENDED BILL OF EXCEPTIONS

This is a criminal prosecution charging the defendant with driving to endanger, an offense set out in M.G.L. Ch. 90 Sec. 24(2), a copy of which is attached and incorporated herein.

The defendant was charged on April 5, 1974 in the District Court of Northern Norfolk [Six-Man Jury]. He moved the trial court by written motion to dismiss the charge against him, a copy of said motion being attached and incorporated herein. The trial court denied the motion, and the defendant took exception to this denial. The trial judge noted defendant's exception.

The defendant being aggrieved by the action of the court in denying his motion to dimiss, to said action

of the court exception more duly taken, prays that this bill of exceptions be allowed.

By his attorney,

(s) ROBERT W. HAGOPIAN
Robert W. Hagopian, Esq.
Wrentham, Massachusetts
02093

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

IN THE CASE OF June 12, 1975

COMMONWEALTH

V.

RICHARD I. LUDWIG

pending in the District Court of Northern Norfolk for the County of Norfolk, No. 4157.

ORDERED, that the following entry be made in the docket; viz., -

Exceptions overruled.

By the Court,

William M. Cloran,
Asst. Clerk

June 12, 1975

Brief statement of the grounds and reasons of the decision:

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 150 of 1974

COMMONWEALTH OF MASSACHUSETTS

V.

RICHARD I. LUDWIG

NOTION OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard I. Ludwig, the appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Judicial Court on June 12, 1975. This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

By his attorney,

_____

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

Supreme Court, U. S.
FILED
OCT 20 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-377

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPELLEE'S MOTION TO DISMISS

FRANCIS X. BELLOTTI
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
TERENCE M. TROYER
Assistant Attorney General
Chief, Criminal Appellate Section
JOHN P. CORBETT
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108

Blanchard Press, Inc., Boston, Mass. — Law Printers

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-377

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPELLEE'S MOTION TO DISMISS

Appellee, pursuant to Rule 16(1)(b) of the Rules of this Court moves to dismiss the appeal for want of a substantial federal question.

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts is reported in 1975 Massachusetts Advance Sheets 1994 and at 330 N.E. 2d 467.

Jurisdiction

The appellant invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

Statement of the Case

The appellant, Richard I. Ludwig, was charged in the District Court, District of Northern Norfolk, with violation of G.L. c. 90, § 24(2)(a) (driving to endanger). He moved the District Court for a speedy jury trial, which motion was denied, a defendant not being entitled to a trial by jury in the first instance under the Massachusetts two tiered system of criminal trials. Upon conviction, appellant prosecuted an appeal, which is available as of right, to a six man jury. G.L. c. 278, § 18; G.L. c. 218, § 27A.

At the *de novo* proceedings, appellant moved to dismiss the complaint alleging that he was denied a jury trial in the first instance. The motion was denied and upon conviction appellant was fined twenty dollars. He then prosecuted exceptions to the Supreme Judicial Court of Massachusetts. The exceptions were overruled.

Questions Presented

Whether the denial of a trial by jury in the first instance when a *de novo* proceeding before a jury is available at the defendant's opinion presents a substantial federal question.

Argument

1. In *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) this Court held that the due process clause of the Fourteenth Amendment made applicable to the states the jury trial provision of the Sixth Amendment. The holding in that

case was based upon the conclusion that, "trial by jury in criminal cases is fundamental to the American scheme of justice . . . ." *Ibid* at 149.

The two tiered system of criminal trials in Massachusetts does not interfere in any appreciable way with the criminal defendant's right to a jury trial. A defendant has an absolute right ultimately to be tried by a jury of his peers. It is submitted that appellant's contention that *Duncan* v. *Louisiana, supra,* in conjunction with *Baldwin* v. *New York,* 399 U.S. 66 (1970), requires trial by jury in the first instance, is not substantial.

While the right to trial by jury has been held to be fundamental within the meaning of the concept of due process, the application of general principles of the Sixth Amendment do not, and should not, necessitate a holding that specific applications of the concept in the federal system are binding upon the states. *See Johnson* v. *Louisiana,* 406 U.S. 356 (1972). (Powell, J. concurring). *Cf. Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Since, under the Massachusetts system, a criminal defendant cannot be ultimately adjudicated guilty of an offense without first having an opportunity to present the question to a jury, it cannot be said that Massachusetts is in violation of the mandate of *Duncan* v. *Louisiana, supra.*

2. The system of *de novo* review utilized by the Commonwealth of Massachusetts does not place an unconstitutional burden upon a defendant's Sixth Amendment right to a speedy trial.

In *Barker* v. *Wingo,* 407 U.S. 514 (1972) this Court outlined standards which courts should employ when considering a claim of denial of a speedy trial. They include, "Length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid* at 530.

Language in *Colten* v. *Kentucky*, 407 U.S. 104, 118, 119 (1972) indicated that a speedy trial argument based on the standards announced in *Barker* does not present, in the circumstances of this case, a question of substantial merit. The court stated:

> "Proceedings in the inferior courts are simple and speedy, and . . . . the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecutions case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a *de novo* trial in a court of general criminal jurisdiction."

The above language is applicable to the Massachusetts system as well. There is no unwarranted delay caused by the two tiered system and the opportunities for discovery and rapid disposition of proceedings in the lower court does not occasion prejudice to the defendant.

3. *Colten* v. *Kentucky*, *supra* at 119-20 also indicates that a double jeopardy attack on the two tiered system of criminal justice in Massachusetts is without merit. There an argument based on double jeopardy implications of the possibility of enhanced punishment upon *de novo* trial was summarily rejected.

The Massachusetts system does not allow the Commonwealth to "make repeated attempts to convict an individual for an alleged offense . . . ." *United States* v. *Green*, 355 U.S. 184, 187-88 (1957). Acquittal in the District Court is conclusive. It is only when a judgment of guilt is returned, and then only at the option of the defendant, that a re-trial is possible.

Conclusion

For the reasons stated, it is respectfully suggested that the appeal be dismissed for failure to present a substantial federal question.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
TERENCE M. TROYER
Assistant Attorney General
Chief, Criminal Appellate Section
JOHN P. CORBETT
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One Ashburton Place
Boston, Massachusetts 02108

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-377

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE APPELLANT

ROBERT W. HAGOPIAN, ESQ.
Wrentham, Mass. 02093

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In the
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OCTOBER TERM, 1975

No. 75-377

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APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE APPELLANT

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts is reported in 1975 Massachusetts Advance Sheets 1994 and at 330 N.E. 2d 467.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision of the Supreme Judicial Court on direct appeal is conferred by 28 U.S.C. §1257(2).

The judgment from which this appeal is taken was rendered on June 12, 1975, by the Supreme Judicial Court and notice of appeal was filed in the Supreme Judicial Court on September 3, 1975. Appellant's jurisdictional statement was filed in this Court on September 10, 1975. Probable jurisdiction was noted on November 11, 1975. Jurisdiction is supported by Costarelli v. Massachusetts, 421 U.S. 193 (1975).

Section 1257(2) is specifically invoked as the constitutionality of Massachusetts' statutory two-tier trial de novo criminal procedure was held not to be repugnant to the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. The statutory procedure is comprised of Article XII of the Massachusetts' Declaration

of Rights[1] which provides that no person "shall be... deprived of his... liberty... but by the judgment of his peers"; G.L. Ch. 218 §26 conferring criminal jurisdiction on the courts in the first tier of Massachusetts' two-tier criminal procedure; and G.L. Ch. 278 §§18, 18A, providing a "right to appeal" to the various courts of the second tier of the system. These statutory provisions have been construed by the Supreme Judicial Court to mean that an accused is to be tried initially in a lower court which "sits without a jury" but that he may have a trial by jury by claiming an "appeal" to a second tier court, Jones v. Robbins, 8 Gray 329, 336, 341-342 (1858); and it is this procedure which was sustained against constitutional attack by the Supreme Judicial Court.

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1 For the purpose of §1257(2), a provision of a state constitution is equivalent to a state "statute", Railway Express Agency v. Virginia, 282 U.S. 440 (1931).

QUESTIONS PRESENTED

1A. Does Massachusetts have a right to deprive an accused of one or more fundamental procedural rights in a criminal trial if it thereafter accords him a trial with the full panoply of rights guaranteed by the Constitution?

1B. Where an accused is entitled to a jury verdict, does the interposition of a trial by judge before a trial by jury impose an unconstitutional burden on the right to trial by jury?

2. Where an accused is entitled to a jury trial, does Massachusetts' procedure of forcing the accused to stand trial before a judge as a prerequisite to obtaining a jury verdict violate the double jeopardy provisions of the Fifth Amendment?

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws (ter. ed.) Ch. 263 §6, Ch. 218 §§26, 27A, Ch. 278 §§2, 18, 18A, 20 and 24, comprise the framework of Massachusetts' two-tier criminal procedure and are set forth in the appendix to this brief (hereinafter Br. App.).

STATEMENT OF THE CASE

Richard I. Ludwig was charged in the District Court of Northern Norfolk pursuant to G.L. Ch. 218 §26 with driving an automobile negligently so that the lives and safety of the public were endangered, a criminal offense set out in G.L. Ch. 90, §24(2)(a)[2] carrying a possible maximum sentence of a fine of $200, or two years of imprisonment, or both. At the commencement of his trial, Ludwig duly moved[3] the district court for a "speedy jury trial" pursuant to his rights under the Fifth and Sixth Amendments. The judge denied this motion, and after a trial, found Ludwig guilty of the offense charged. Thereupon, Ludwig claimed an "appeal" for a trial de novo in the District Court of Northern Norfolk Six-Man Jury pursuant to G.L. Ch. 278 §18 and Ch. 218 §27A.

In the de novo proceedings, Ludwig duly filed a "motion to

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2 The relevant parts of G.L. Ch. 90 §24(2) are set out in the Br. App. at p. 12a.

3 See App. p. 7a.

dismiss" on the grounds that he was denied a speedy jury trial in the first instance.[4] This motion was denied and Ludwig took an exception pursuant to G.L. Ch. 278 §31. After being found guilty in a jury-waived trial and sentenced to pay a $20 fine, payment of which was stayed, Ludwig filed a bill of exceptions to the Supreme Judicial Court pursuant to G.L. Ch. 278 §31 alleging that the denial of his "motion to dismiss" was error. The Supreme Judicial Court overruled the exceptions, Commonwealth v. Ludwig, Mass. Adv. Sht. [1975] p. 1994, 330 N.E. 2d 467. It held that "the claimed infractions of constitutional rights - the right to a speedy trial under the Sixth Amendment, the right to a jury trial under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights, and the guaranty against double jeopardy" were "properly" before the court and "untenable": "We have suffered no change of mind on the constitutional issues since the Whitmarsh decision."

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4 See App. p. 5a.

SUMMARY OF THE ARGUMENT

Massachusetts maintains a two-tier de novo criminal procedure. For most offenses, the accused is brought to trial initially in a first tier court where he is tried before a judge. He cannot obtain a trial by jury, but if he is dissatisfied with the judgment of the lower court, he may "appeal" to the second tier where he may obtain a trial de novo by jury as a matter of right. If the defendant is found guilty in the second tier court, he can obtain traditional appellate review of this conviction in the Massachusetts Appeals Court or Supreme Judicial Court.

In Callan v. Wilson, 127 U.S. 540, 557 (1888), this Court unanimously held that the right to trial by jury secured to the accused "the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged". In Duncan v. Louisiana, 391 U.S. 145, 149, 158 ftn. 30 (1968), this Court held that the Fourteenth Amendment guaranteed "a right of jury trial in all criminal cases which - were they to be tried in

a federal court -would come within the Sixth Amendment's guarantee", and hence, by implication, bound Massachusetts to the rule of Callan v. Wilson, subject to the qualification in Justice White's ftn. 30 that the Court's decisions interpreting the Sixth Amendment were "always subject to reconsideration".

Appellant maintains that the essence of the rule of Callan v. Wilson is that the accused should not be put "to the burden of two trials if he wishes a jury verdict" and that the interposition of a trial by magistrate is an unconstitutional imposition on the exercise of the right to trial by jury. The burden on the right to trial by jury includes the additional expense the accused must bear for a meaningless trial in the lower court, the embarrassment of being found guilty and "appealing", the stigma and anxiety resulting from conviction, and the threat of an increased penalty upon reconviction in the second tier.

The burden of a lower court trial cannot be circumnavigated as was the situation in Colten v. Kentucky, 407 U.S. 104 (1972).

On the other hand, if the defendant remains silent and is convicted, collateral consequences, e.g. loss of one's driver's license, are imposed notwithstanding the fact that the "judgment" of the first tier court is "vacated" by the accused's exercising his right of "appeal" for a de novo jury trial in the second tier. Likewise, if the accused fails to "prosecute his appeal, he shall be defaulted on recognizance and the superior court may impose sentence upon him for the crime of which he was convicted."

Quite apart from its being a burden, the interposition of a trial by magistrate runs counter to the "purpose" and "function" of the right to trial by jury, namely, to protect the accused from governmental oppression,and to interpose "between the accused and his accuser...the commonsense judgment of a group of laymen." From this it follows that the rule of Callan v. Wilson is an essential element of a jury trial in contradistinction to the unanimity or twelve-man requirements which are "features" relating to the composition of a jury.

In a nutshell, appellant submits that once a defendant is placed in jeopardy, Massachusetts has no more right to deprive him of his right to trial by jury than his right to counsel, or his right to remain silent, or his right to confront witnesses. It is no answer on Massachusetts' part to say that it offers the defendant a trial de novo with the full panoply of Sixth Amendment procedural rights. Similarly, Massachusetts has no compelling state interest to deny the accused a trial by jury in the first instance as it may accomplish its purpose of conserving its judicial resources by maintaining a two-tier structure while simultaneously allowing a defendant the choice of proceeding in the first tier initially or obtaining a jury trial in the first instance in the second tier as is the procedure in Rhode Island in the aftermath of State v. Holliday, 109 R.I. 93 (1971).

Lastly, appellant maintains that Massachusetts' de novo procedure violates the double jeopardy provisions of the Fifth Amendment. Manifestly, the procedure subjects a defendant to the threat of multiple trials. Upon conviction in a lower court, the accused is subjected to the "embarrassment" of being

found guilty and "appealing" in a criminal proceeding. While awaiting his "trial de novo" in the second tier court, he is compelled "to live in a continuing state of anxiety and insecurity". Additionally, the de novo trial in the second tier subjects the accused a second time to the "heavy personal strain" which a criminal trial represents. As such, this procedure is not consonant with the Fifth Amendment mandate of limiting "the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws".

ARGUMENT

I - THE TWO-TIER TRIAL DE NOVO PROCEDURE

The first tier of Massachusetts' two-tier de novo system is comprised of the district courts and the Municipal Court of Boston. These courts have jurisdiction over all misdemeanors and crimes carrying a possible maximum prison sentence of five years or less, and certain enumerated felonies having possible maximum prison sentences in excess

of five years.[5] Criminal proceedings in a first tier court are commenced by the issuance of a complaint. If the defendant pleads guilty to the complaint at arraignment, he is sentenced by the district or municipal court. If he is dissatisfied by the sentence, he may "appeal"[6] the issue of his sentence to a court in the second tier of the de novo structure, but he is not entitled to a de novo trial in the second tier on his innocence or guilt, Commonwealth v. Crapo, 212 Mass. 209, 210 (1912).

If the defendant pleads not guilty in the first tier court,

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5 G.L. 218 §26 (Br. App. 2a). This jurisdiction is concurrent with the superior court in the second tier, but as a matter of practice, prosecution is almost always commenced in the first tier courts. See generally Smith, Massachusetts Criminal Practice and Procedure, §44.

6 G.L. Ch. 278 §§18, 18A (Br. App. 2a, 8a).

he must stand trial before a judge as the first tier court "sits without jury". If he is convicted in a district court, he may "appeal" either to the superior court[7] where he may obtain a twelve-man jury or the Six-Man Jury division of the district court[8] where he may obtain a six-man jury. If he is convicted in the Municipal Court of Boston, he may "appeal" to the superior court where he may obtain a twelve-man jury, or alternatively,[9] he may "appeal" to the Twelve-Man Jury division of the Municipal

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7 G.L. Ch. 278 §§2, 18 (Br. App. a).

8 G.L. Ch. 218 §27A (Br. App. 4a). The only practical difference to this alternative is the shorter time in obtaining a jury trial as compared to the time required for obtaining a jury trial in the superior court.

9 G.L. Ch. 278 §18A (Br. App. 8a).

Court of Boston.[10] If a defendant fails to "prosecute his appeal [in the second tier], he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court", G.L. Ch. 278 §24. (emphasis added)

If a defendant is found guilty in a second tier court, he may obtain, by right, appellate review of his conviction in the Massachusetts Appeals Court or the Supreme Judicial Court.[11]

II - THE SIXTH AMENDMENT JURY TRIAL GUARANTEE MEANS TRIAL BY JURY IN THE FIRST INSTANCE AND IS MADE APPLICABLE TO MASSACHUSETTS BY THE FOURTEENTH AMENDMENT

In Jones v. Robbins, 8 Gray

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10 Hence, the second tier of the Massachusetts system is comprised of the superior court, the Six-Man Jury division of the district courts, and the Twelve-Man Jury division of the Municipal Court of Boston.

11 G.L. Ch. 278 §§28, 31, 33A-33G.

329, 341 (1958), Chief Justice Shaw of the Massachusetts Supreme Judicial Court concluded that the right to trial by jury did not mean trial by jury in the first instance, but only that the Commonwealth must afford an accused a jury trial at some time. In reaching this result, the eminent Chief Justice was construing Article XII of the Declaration of Rights[12] guaranteeing that no law "shall subject any person to... infamous punishment... without trial by jury", a clause which he noted was "equivalent" to the Sixth Amendment provision: "...in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury...". More specifically, the Chief Justice held:

> And we believe it has been generally understood and practiced here and in Maine, and perhaps in other States having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself or waive, at

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12 Br. App. p. 1a.

his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to a common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment to the court appealed to.[13]

Thirty years later, in Callan v. Wilson, 127 U.S. 540 (1888), this Court had occasion to review the consitutionality of the District of Columbia's two-tier trial de novo procedure which was identical to the Massachusetts system.[14] In its decision, Justice Harlan took note at p. 553-4 of the aforesaid

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13 See also Mann v. Commonwealth, 359 Mass. 661, 663-664 (1971).

14 Callan v. Wilson, supra, p. 551.

quoted portion of Chief Justice Shaw's opinion, and then rejected its reasoning at p. 556-7:

> Except in the class or grade of offenses called petty offenses,...the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirement of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty

> of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

This decision, of course, was not binding upon Massachusetts. However, in Duncan v. Louisiana, 391 U.S. 145, 149 (1968), this Court made the Sixth Amendment applicable to the states:

> [W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee;

and at p. 157:

> Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offences is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. (emphasis added)

The State of Louisiana argued against this holding on the grounds that "if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment including the guarantee for a twelve-man jury, the unanimous verdict requirement, and the rule of Callan v. Wilson, 127 U.S. 540". In rejecting this agrument, Mr. Justice White observed at p. 158, ftn. 30:

> It is very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision... . Indeed, there appear to be only four States in which juries of fewer than twelve can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However, ten

> states authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a de novo trial before a jury in a different court.

The breadth of the majority opinion is made clear by Mr. Justice Fortas in his concurring opinion at p. 213: "But although I agree with the decision of the Court, I cannot agree with the implication, see ante, at p. 158, ftn. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts." Similarly, Mr. Justice Harlan acknowledged the same in his dissent at p. 181:

> Consequently, the court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is

> whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out'.

Duncan was followed by Baldwin v. New York, 399 U.S. 66 (1970), wherein five out of eight members of this Court "agreed that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months".[15] Of the five members, three drew the demarcation line between "petty" and "serious" crimes at six months[16] as is defined by common law[17] and in the federal

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15 Codispoti v. Pennsylvania, 418 U.S. 506, 512 ftn. 4 (1974).

16 Cf. Callan v. Wilson, 127 U.S. 540, 549, 556 (1888).

17 Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guarantee to Trial by Jury, 39 Harv. L. Rev. 917, 934 (1926).

system[18], and two held that the jury trial provisions of the Sixth Amendment were applicable to "all crimes".

In light of Duncan and Baldwin, Ludwig maintains that he was entitled to by a trial by jury in the district court of Massachusetts as the maximum possible sentence under G.L. Ch. 90 §24(2)(a) was a $200 fine or two years imprisonment, or both. His contentions, however, were rejected by the Massachusetts Supreme Judicial Court which relied upon Whitmarsh v. Commonwealth, ___Mass.___, 316 N.E. 2d 610 (1974).

In Whitmarsh, the Supreme Judicial Court held that the "state of the law on the subject is highly uncertain" and therefore it was not "required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance.., or (b) that even if that court did reaffirm this rule... with respect to the Federal Courts, it would apply such a requirement in equal fashion to the states". Appellant submits, however, that

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18 18 U.S.C §1.

it was the duty of the Supreme Judicial Court under Article VI of the Constitution to interpret the decisons of this Court as they existed and apply them. Instead, the Supreme Judicial Court evaded the issue on the grounds that "the meaning of the Sixth Amendment's jury trial provision and perhaps also specific instances of its application to the States... continues to be in flux".

In support of its position, the Supreme Judicial Court relied upon Williams v. Florida, 399 U.S. 78 (1970), and Apodaca v. Oregon, 406 U.S. 404 (1972). In Williams, this Court held that the States are not required to afford a defendant a twelve-man jury. In reaching this conclusion, this Court in effect overruled the federal twelve-man requirement and hence this decision is entirely consistent with Mr. Justice White's remark in ftn. 30 in Duncan: "[o]ur decisions interpreting the Sixth Amendment are always subject to reconsideration... ." At the same time, Duncan itself was reaffirmed by the Court at p. 86 and by Mr. Justice Black concurring at p. 107:

We have emphatically "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down, subjective version of the individual guarantees of the Bill of Rights.'" Malloy v. Hogan, 378 U.S. 1, 10-11. Today's decision is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to reexamine prior decisions to reach the correct constitutional meaning in each case. The broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in a situation where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment. Had the questions presented here arisen in a federal court before our decision in Duncan v. Louisiana, 391 U.S. 145 (1968), this Court would still, in my view, have reached the result announced today.

In Apodaca, this Court held that the unanimous jury requirement of the Sixth Amendment was not applicable to the states. In so holding, four justices impliedly overruled the requirement as to federal trials and as such their plurality opinion is consistent with Duncan. Mr. Justice Powell reached the same conclusion, but was not in "accord with a major premise upon which that judgment" was based, namely "that the concept of jury trial as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment", Johnson v. Louisiana, 406 U.S. 356, 369 (1972). Three justices in dissent felt that the federal standard should not be changed and hence, the states should be bound to the unanimous jury requirement on the basis of Duncan. As such, the decision is not a departure from Duncan in principle, but rather, it simply redefined "what is meant by the concept 'jury'" within the meaning of the Sixth Amendment. Accordingly, appellant submits that neither Williams or Apodaca support the Supreme Judicial

Court's position in Whitmarsh.[19]

Other state and lower federal courts have rendered conflicting opinions as to whether Duncan and Baldwin bound the states to the rule of Callan v. Wilson. The Supreme Court of Rhode Island has answered the question in the affirmative in State v. Holliday, 109 R.I. 93, 103, (1971):

> We hold, then that those charged with misdemeanors that could result, upon conviction, in the imposition of a sentence of more than six months are entitled to a speedy and prompt trial by an impartial jury in the first instance.

The Supreme Court of Virginia reached the opposite conclusion in Manns v. Commonwealth, 213 Va. 2d 233 (1972)[20] holding that Mr. Justice White's ftn. 30 in Duncan "makes

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19 See Constitutionality of the De Novo Procedure, 55 B.U. Law Review 25, 35-42 (1975).

20 Cf. Manns v. Koontz, 451 F. 2d 1345 (4th cir. 1971).

it clear" that the question of "incorporation" was an "open" one. See also to the same effect, Walker v. Dillard, 363 F. Supp. 921 (W.D.V. - 1973) which, like Manns, relied on Mr. Justice Fortas' concurring opinion to Duncan. Since these opinions are contrary to this Court's holding in Duncan, appellant alleges that they are inapposite.[21]

III - THE INTERPOSITION OF A TRIAL WITHOUT JURY PRIOR TO AFFORDING A DEFENDANT A TRIAL BY JURY IS AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO TRIAL BY JURY

As Justice Harlan called to our attention in Baldwin v. New York, 399 U.S. 66, 137 (1970), the bedrock of Callan v. Wilson is that the accused should not be put to "the burden of two trials if he wishes a jury verdict". That "burden" was eloquently set forth by Mr. Justice Thomas of the Supreme Judicial Court in his memorable dissent in Jones v. Robbins, 8 Gray 329, 351-2 (1858):

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21 Cf. Miller v. Commonwealth, 14 S.E. 2d 161 (1892).

It seems to me plain that, when the Constitution declares that "the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury," its meaning is trial by jury when and wheresoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offense subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed clog and obstruct his trial by jury; but the difference between that and this is in degree only.

The subjecting the accused to one trial by a single magistrate obstructs the rights

of a trial by jury, and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and the holding to bail. It interposes unnecessary delay between the accusation and trial by his peers. It subjects him to unnecessary and often fatally burdensome expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right "freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay".

When you state the proposition that a man may be constitutionally tried for murder by a justice of the peace or a police court, or by any single judge, even after indictment, and he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the Constitution, and with the common law rights

secured by it, shrinks from the conclusion; yet it is to be observed, that the twelfth article of the Bill of Rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishments. They stand on the same ground.

I am aware that in some text-writers of authority, and in the dicta of judges for whom I feel the highest respect it has been said, that if there is an unobstructed and unclogged right of appeal to a court in which a trial by jury can be obtained, the article of the Bill of Rights is satisfied. To this view I answer...[t]hat it is not an unobstructed and unclogged right of appeal, which the twelfth article secures, but an unobstructed and unclogged right of trial by jury.[22]

Initially, it is observed that Justice Thomas recognized

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22 "To these weighty words of Judge Thomas no satisfactory reply has ever been made." State v. Gerry, 68 N.H. 495, 507 (1896).

the possibility that if a "citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time". This same objection was raised by Justice Blatchford in In re Dana, 7 Benedict 14 (1876): "If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial,... it is difficult to see why it may not also have the power to provide several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury". Cf. Williams v. Florida, 399 U.S. 78, 91 ftn. 28 (1970).

The "unnecessary and often fatally burdensome expense" referred to by Justice Thomas includes the defendant's legal fees, witness fees, and his loss of time and pay. For the accused who is innocent, but found guilty, he must bear these expenses for a meaningless proceeding before he ever gets into court where he may obtain a jury verdict. While it is true that Massachusetts assigns indigents free counsel,[23] Argersinger v.

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23 Rule 3:10 of Rules of the Supreme Judicial Court; G.L. Ch. 221 §34D.

Hamlin, 407 U.S. 25 (1972), there are many defendants who are just above the indigent level and must hire private counsel for their defense in the lower Massachusetts courts.[24] On the average, this expense is in the range of $150 - $250. If the defendant "appeals" for a trial de novo he must pay further counsel fees of a minimum of $400. Cf. Massachusetts Bar Association's Minimum Fee Schedule (1973). The expense of the lower court trial is often "fatally burdensome". For example, this attorney witnessed a trial in a district court in which a school teacher was convicted for larceny of merchandise from a discount store. Upon conviction the defendant's lawyer informed him of his right to a jury trial. The defendant asserted his innocence and indicated he

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24 Recognizing this problem, the Boston Bar Association has established MIDA, a marginally indigent defendant program wherein participating attorneys represent those who are just above the poverty level at rates that range $75-$150 depending upon the nature of the charges.

wanted to "appeal". His counsel then informed him that the cost for his services on "appeal" for arraignment and trial would be $450. The defendant replied: "Well, I already have lost two days pay and $250 and if we appeal it will cost me another two days pay and $450 more. I cannot afford that. We better take the best deal we can get here."[25]

In and above the financial burden, a Massachusetts' lower court trial has a dampening effect on the right to trial by jury. Some of the more discouraging aspects of the proceeding are summarized by Bing and Rosenfeld in The Quality

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25 "We have concluded on the basis of hard statistical data that in determining guilt or innocence, a man's finances are more important than the circumstances surrounding the charge, and ultimately, money determines the final disposition," Bing and Rosenfeld, The Quality of Justice (1970), p. ix. See also Hasler, De Novo Jury Trials, 23 Maine Law Rev. 63, p. 82-83 (1971).

of Justice in the Lower Courts of Boston, (1970) (hereinafter The Quality of Justice) at p. 105-6:

> Arguments on motions when they are brought, pit the judge and defense counsel as adversaries. The police prosecutor, unfamiliar with controlling court decisions, participates only to comment upon the facts. The burden falls upon the judge first to develop the arguments in opposition to the defense motion, and then decide who has made the better argument.
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> When defense counsel make motions to suppress illegally obtained evidence, district court judges frequently reserve decision until the entire case has been heard. If he thinks the defendant is guilty - influenced in part by the questionable evidence - rather than weighing the motion exclusively on its merits, he is in a position to balance the legal merits of the motion against the seriousness of the crime.
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> The trials themselves are brief. One judge's impatience

> with zealous defenses was expressed when he remarked to a defense counsel, "We don't follow those Supreme Court decisions here."
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> The formal requirement for a guilty finding is proof beyond a reasonable doubt. In district court trials, there are strong indications that the government's burden is reduced to showing that the preponderance of the evidence establishes the defendant's guilt....
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> At the heart of the district court's attitude, which overlooks rules of law and guaranteed rights, is the belief that the defendant can always protect himself by asserting his right to trial de novo.

The most graphic illustration that the law of the land is ignored in the first tier Massachusetts courts is set forth in Arnold v. Second District Court, No. 75-321, now pending in the Supreme Judicial Court. In this case, the trial judge of a district court refused to pass on the constitutional issues raised by defense counsel, or to put in his own words:

> I've said it on the record. It's now going on the record that I don't have the power or authority to strike the statute down in a constitutional sense, and the only court that has that power is the Supreme Court of Massachusetts.

Compare Huffman v. Pursue Ltd., 421 U.S. 592, 611 (1975): "Yet, Article VI of the Constitution declares that 'the judges in every state shall be bound' by the Federal Constitution laws and treaties."

The most graphic illustration that the burden of proof is reduced to the preponderance of the evidence is a case reported by Bing and Rosenfeld, The Quality of Justice (1970), at p. 83. In this decision, the trial judge resolved the conflicting testimony of the defendant and police officers by holding: "Well I don't know who to believe. Just to play safe I will find you guilty."

Quite apart from the trial itself, the sentencing procedure is often a fatal deterrent on the exercise of the accused's right to trial by jury. For example, in Costarelli v. Municipal Court of Boston, Mass. Adv. Sht. [1975]

481, 483, 323 N.E. 2d 859, 860, the trial judge in the Municipal Court of Boston announced that he would impose a one year suspended jail sentence if the defendant would forgo his "right to appeal" for a trial by jury, or otherwise he would impose a one year sentence. When this attorney objected to the choice the trial judge addressed Costarelli: "Take your pick, one year suspended with no appeal, or one year with appeal".[26] Costarelli exercised his "right of appeal" in accordance with his counsel's strong advice and over his own judgment. The trial judge then imposed the one year sentence. This type of sentence conditioning is not the result of personal vindictiveness, cf. Blackledge v. Perry, 417 U.S. 21 (1974), but rather it is the product of the institu-

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26 For a more detailed description of this technique, see Bing and Rosenfeld, The Quality of Justice (1970), at p. 86-88. For another paradigm, see Grayson v. Montgomery, 421 F. 2d 1306 (1st cir. 1970).

tional interest[27] of the district court judge in discouraging what he considers frivolous "appeals".[28]

Another inhibiting sentencing technique is illustrated in Endbinder v. Municipal Court of Boston, Mass. Adv. Sht. [1975] 2115, 330 N.E. 2d 846. In this case, a muncipal court judge informed the defendant, at the end of a first tier court trial, that the court would enter a not guilty finding if she would agree to sign a release against the complaining police officer. The defendant refused, and solely because of this refusal, the trial judge entered a guilty finding. Thereupon, the defendant "appealed" to the superior court where she was aquitted.

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27 See Bing and Rosenfeld, The Quality of Justice (1970), at pp. 86-88; and Chaffin v. Stynchone, 412 U.S. 17,27 (1973).

28 Ch. 459 §2 of the Massachusetts Acts of 1975 has abolished this practice as a "matter of law".

In addition to the deterrent sentencing procedures in the first tier courts, the defendant faces the threat of a harsher sentence being imposed if he is reconvicted in the superior court. More specifically in Mann v. Commonwealth, 359 Mass. 661 (1971), the Supreme Judicial Court held that a superior court judge may augment the district court sentence and that he does not have to affirmatively justify such action. See also Lemieux v. Robbins, 414 F. 2d 353 (1st cir. 1969), cert. denied, 397 U.S. 1017 (1970) holding the same. The decisions in both these cases rested upon North Carolina v. Pearce, 395 U.S. 711 (1969). However, the issue in Pearce was whether the threat of an increased penalty being imposed on retrial burdened the right to appellate review in contradistinction to the right to trial by jury. These rights are entirely different. In the Pearce situation, the second trial results at the defendant's "behest". In the de novo precedure, the second trial results from the government's "behest" as it cannot imprison the accused unless it is pursuant to the judgment of his peers, and under these circumstances, the imposition of an increased penalty constitutes a penalty on the right to trial by jury:

> I find it equally difficult to reconcile the increase of penalties, upon a conviction after an appeal, with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offense. Certainly it cannot be said that the offense is aggravated, by the accused having claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offense remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right? Greene v. Briggs, 10 F. Cas. 1135, 1141 (No. 5,764) (C.C.R.I. 1852).

This distinction was raised in Whitmarsh v. Commonwealth, ___Mass. ___, 316 N.E. 2d 610, 619-620 (1974), but the Supreme Judicial Court rejected it on the authority of

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Colten v. Kentucky, 407 U.S. 104 (1972). In Colten, this Court sustained an augmented sentence imposed after a trial de novo in the second tier of Kentucky's two-tier procedure. But this holding is not controlling because the two-tier procedure in Kentucky is fundamentally different than the Massachusetts procedure. In the Kentucky procedure, the accused is afforded a jury trial in the first tier. Colten expressly waived this right.[29] Accordingly, his trial de novo in the second tier of the Kentucky procedure was at his "behest" and as such was equivalent to retrial subsequent to appellate reversal as was the case in

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29 "Although appellant here was entitled to a six-man jury,... which he waived...," Colten, at p. 113. Additionally, it should be observed that Colten was not even entitled to a jury trial at any time as a matter of federal right since the maximum penalty under the statute upon which he was charged did not exceed six months imprisonment.

Pearce.[30]

Quite apart from this consideration, this Court took pains to note that in the Kentucky procedure, "the record from the lower court is not before the superior court and is irrelevant to its proceedings", and "[i]n all likelihood, the trial de novo court is not even informed of the sentence imposed in the inferior court and can hardly be said to have 'enhanced' the sentence". As such, this Court refused to impose the prophylactic rule of

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30 Colten is also distinguished by the fact that the accused in the Kentucky procedure "can circumnavigate the inferior court simply by pleading guilty and erasing immediately thereafter any consequence which would otherwise follow from tendering the plea," Colten, at. pp. 119-120. Cf. Lemieux v. Robbins, 414 F. 2d 353, 356 (1st cir. 1969), cert. denied 397 U.S. 1017 (1970): "[W]e hold the defendant has no constitutional right to complain of the "chilling effect" when in effect, he need not stand in the draft of the first instance."

Pearce. In Massachusetts, however, the record of the lower court proceedings, including the sentence imposed, is transmitted to the superior court, G.L. Ch. 278 §20 (Br. App. 10 a). If the accused is convicted again, the resentencing judge as a matter of practice usually inquires initially as to why the lower court sentence should not be reimposed. Such a procedure evidences the institutional weight of judicial comity between the two tiers in the Massachusetts system, and manifestly discourages "appeals".31

When viewed in toto, appellant submits that the above noted burdens, - the legal expenses, witness fees, loss of pay, rigors of a first tier trial, threatening sentencing techniques, and the threat of increased penalties upon retrial - are a deterrent on the exercise of the accused's right to trial

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31 The de novo jury is also aware that the accused has been previously adjudged guilty. Compare Chaffin v. Stynchone, 412 U.S. 17, 28, ftn. 13-14 (1973).

by jury. In a given case, any one of the above factors may wear down the individual and tip the scales against the exercise of his right to trial by jury. Additionally, and, perhaps most important, there exists the inherent "heavy personal strain"[32] "- pyschological, physical and financial -"[33] that results from the trial and the embarassment, humiliation and stigma[34] that attach to the conviction itself.[35] Indeed, the inescapable

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32 United States v. Jorn, 400 U.S. 470, 479 (1971).

33 Breed v. Jones, 423 U.S. ___ (1975).

34 Argersinger v. Hamlin, 407 U.S. 25, 44 (1972), (Powell concurring).

35 "[The accused] stands morally, and in respect to his character and good name, as if, after a jury's verdict of guilty, he is awarded a new trial. This is a hardship to which the common law of England and the common law of the colony in 1784 he could not be subjected." State v. Gerry, 68 N.H. 495, 509 (1896).

conclusion is that the interposition of a trial by magistrate deters the exercise of the right to trial by jury, and as such, constitutes an unconstitutional burden on the right, United States v. Jackson, 390 U.S. 570, 582, 583 (1967): "A procedure need not be inherently coercive in order that it be held to impose an impermissable burden;" for "if the provision had no other... effect than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional".

IV - THE ARGUMENTS IN SUPPORT OF MASSACHUSETTS' TRIAL DE NOVO PROCEDURE ARE WITHOUT CONSTITUTIONAL MERIT

Two arguments have been set forth to establish that the imposition of a trial by magistrate is not an unconstitutional burden on the right to trial by jury. The first is set forth by Mr. Justice Shaw in Jones v. Robbins, 8 Gray 329, 341 (1858), namely, that the only burden placed on the accused in the two-tier process is the delay and recognizance which "are the same and no greater than they would be in case the magistrate, instead

of passing sentence should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail". This theory is fully rebutted by Chief Justice Carpenter in State v. Gerry, 68 N.H. 495, 505-6 (1896):

> To say that the required recognizance upon an appeal subjects the party to no greater inconvenience, - is no greater burden than the recognizance required upon an examination and binding over - if it were true, does not conclude the matter. It is not merely the recognizance but the judgment of the magistrate, the sentence without a jury trial, that burdens. But it is not true. In legal effect, the difference between recognizances upon a binding over and upon an appeal is great. In the first case, the sole consequence of a default or forfeiture is to create a debt in the amount of the recognizance, payment of which may be enforced. Upon the forfeiture of the recognizance taken on appeal not only is the defendant subjected to the payment of the amount of the recognizance, but he is also, under the

> Massachusetts statute, sentenced by the court appealed to as if he had been convicted in that court. By his default he is held to waive a jury trial. Commonwealth v. Whitney, 108 Mass. 56-7.

The Massachusetts statute referred to above was the predecessor to G.L. Ch. 278 §24, (Br. App. 11a), which requires that upon the failure of the defendant to prosecute his "appeal", "he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted."[36] This statute in

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36 The constitutionality of this procedure is pending before the Supreme Judicial Court in Costarelli v. Sheriff of Middlesex, No. 75-277. In this case, Costarelli was arrested for allegedly being in default on his "appeal" to a second tier court. Thereupon, he was brought before a judge (without his counsel being present) who imposed the one year prison sentence of the lower court from which his appeal had been taken.

effect shifts the burden to the accused, a patently unconstitutional procedure:

> A fatal objection to this doctrine is that it puts the burden of obtaining a jury trial upon the defendant, instead of the state. It compels him to appear and demand the trial, without which the constitution expressly declares he shall not be condemned. The difference between a right to jury trial upon demand made therefor and the right not to be convicted or punished until a trial is had, is wide. A man is not to be imprisoned or otherwise punished because a corrupt or ignorant magistrate has found him guilty of crime,... As long as he remains entirely passive, -as long as he neither does nor says anything relative to the charge against him, except to maintain his innocence by a plea of not guilty, - he is assured by the express terms of the constitution that he cannot be punished until the state has obtained a verdict of guilty from twelve of his neighbors. "No subject shall be deprived of life,

> liberty, or estate but by the judgment of his peers." This language does not mean - it cannot reasonably be construed to mean - that he may be tried and finally condemned by a magistrate unless he takes certain prescribed measures to procure a constitutional trial. State v. Gerry, supra, p. 506.

The second contention is that trial de novo is to the defendant's advantage in that he "gives up nothing by going to trial in the district court", Lemieux v. Robbins, supra, at p. 355, while at the same time "he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own", Mann v. Commonwealth, 359 Mass. 664, 666 (1971). "Thus, in effect...the defendant has 'two bites at the cherry'," Mann v. Commonwealth, supra, at p. 663. Such an argument ignores the "collateral consequences"

that attach to a conviction[37] in a first tier court.[38] For example, in the instant case, Richard I. Ludwig's automobile license was automatically revoked upon his conviction for driving to endanger pursuant to G.L. Ch. 90 §24(2). Since this revocation is predicated on "the commission of a criminal offense," One Lot Stones v. United States, 409 U.S. 232, 236 ftn. 6 (1972), it is a criminal penalty,

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37 "Nor is it an answer to this to say that, when the accused is tried before a jury in the appellate court, he stands unprejudiced by his previous conviction. This may be so in theory of the statute, but it is so theoretically only; for naturally the moral effect of the conviction has a tendancy, at least, to prejudice his case in the estimation of the jury." Miller v. Commonwealth, 14 S.E. 2d 161 (1892).

38 Cf. Mayer v. City of Chicago, 404 U.S. 189, 197 (1971): "The practical effects of conviction of even petty offenses...are not to be minimized."

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965); United States v. United States Coin and Currency, 401 U.S. 715, 718; and Boyd v. United States, 116 U.S. 616, 634 (1886).[39] As such, at least one highest state court has held that the revocation cannot be imposed except pursuant to a jury verdict:

> In extending the right to a jury trial, we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business.* It must also in-

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39 As a matter of state law, this penalty is not part of the "judgment" of the first tier court. Cf. Costarelli v. Massachusetts, 421 U.S. 93, ftn. 2 (1975). Compare Lefkowitz v. Newsome, 420 U.S. 283, 294 (1975), White dissenting.

clude offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.

* This does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from consideration of only guilt or innocence of crime. Baker v. City of Fairbanks, ___ Alaska ___, 471 P. 2d 386, 402 (1970).[40]

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40 See also District of Columbia v. Colts, 282 U.S. 63, 73 (1930); and Parham v. Municipal Court, ___ Iowa ___, 199 N.W. 2d 50 (1972). Cf. In re Winship, 397 U.S. 358, 363-4, 367 (1970); In re Gault, 387 U.S. 1, 50 (1967); and Frank v. United States, 395 U.S. 147, 159-169 (1969).

The threat of the collateral consequences which attach upon conviction compels an accused to try his case in the lower court before a judge. Such a procedure forces the accused to expose his defense and is inherently unfair as is called to our attention by the Court of Appeals for the Ninth Circuit in Breed v. Jones, 497 F 2d 1160, 1168 (1974), aff'd 423 U.S. ___ (1975):

> There are basic issues of fairness upon which we should comment. Nowhere in our criminal system do we allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged. The most heinous and despicable criminal is saved from such an invasion of his fundamental rights.... This offends our concepts of basic, even-handed fairness.

Likewise, cross examination of prosecution witnesses has the tendency of hardening and polishing the government's case for the de novo trial in the superior court. See e.g. Ashe v. Swenson, 397 U.S. 436, 439-440 (1970); and Carsey v. United States, 392 F. 2d 810,

813-814 (D.C. cir. 1967) which detail the metamorphasis of testimony in first and subsequent trials. Alternatively, if defense counsel does not cross examine the government's witnesses in the lower court, and if they subsequently become unavailable, their unimpeached testimony will be admitted against the accused since he had the opportunity to cross examine the witnesses in the lower court. See Commonwealth v. Mustone, 353 Mass. 490 (1968) distinguishing Pointer v. Texas, 380 U.S. 400 (1965).

V - THERE IS NO COMPELLING INTEREST TO JUSTIFY MASSACHUSETTS' DENIAL OF A TRIAL BY JURY IN THE FIRST INSTANCE

When Richard I. Ludwig was placed in jeopardy before the District Court of Northern Norfolk, it was his right to obtain a judgment of his peers. Massachusetts had no more right to deny him this fundamental right than it would have to deny him his right to confront his accusers, his right to counsel of his own choosing, his right to an impartial tribunal, or the right to remain silent. It is no answer on Massachusetts' part to

say that it offered Richard I. Ludwig a "trial de novo" with the full panoply of constitutional procedural rights. This argument was rejected in Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972), wherein the accused was initially denied an impartial tribunal:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court;...Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Massachusetts, of course, has a legitimate interest in allocating its judicial resources by maintaining a two-tier structure, Lemieux v. Robbins, 414 F 2d 353, 355 (1st cir. 1969), cert. denied, 397 U.S. 1017 (1970). The basis underlying

this interest and the two-tier structure is that the state may prosecute marginally serious crimes more efficiently in a manner other than trial by jury. Be this as it may, Massachusetts is foreclosed from differentiating between degrees of serious crimes by the conjunctive effect of Duncan, Baldwin and Williams.[41] These cases define the "petty-serious" dividing line and hold that in a "serious" crime, the accused has an unqualified right to be insulated from the full resources of the state by the interposition of the community's judgment. Accordingly, appellant submits that if Massachusetts is to maintain a two-tier structure which denies the accused a jury in the first instance, then it must tailor the procedure to the constitutional line between petty

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41 See Hasler, De Novo Jury Trials, 23 Maine Law Rev. 56, 79, 81-85 (1971).

and serious crimes.[42]

In addition to these considerations, appellant maintains that Massachusetts has no compelling state interest to justify denying the accused a trial by jury in the first instance even if, arguendo, it is assumed that the compelling interest doctrine is applicable to test the constitutionality of the deprivation of a fundamental procedural right in a criminal proceeding. The state's interest

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42 The six month demarcation line applies only with respect to the right to trial by jury and not to other Fifth or Sixth Amendment procedural rights. Cf. Argersinger v. Hamlin, 407 U.S. 25, 30, 45-46 (1975). Its historical origins are deep-rooted in common law whereas de novo jury trials were non-existent at common law or in America in 1784. See Frankfurter & Corcoran, Petty Federal Offences and the Constitutional Guarantee of Trial by Jury, 38 Harv. L. Rev. 917, 932-362 ftn. 85 (1926); and State v. Gerry, 68 N.H. 495, 499-500 (1896).

in economy cannot justify its depriving the accused of his right to jury verdict once placed in jeopardy. Justice Black made this quite clear in Green v. United States, 356 U.S. 165, 216 (1958):

> It is undoubtedly true that a judge can dispose of charges... faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of value justice occupied at least as high a position as economy.

Additionally, it should be observed that Massachusetts' interest in maintaining a two-tier structure can be achieved equally as well, if not more efficiently, by allowing the accused the option of proceeding

initially in the first tier or, alternatively, allowing him to obtain a jury trial in the first instance in the second tier.

More specifically, there are certain cases in which a defendant, if given an option, will always choose a trial by jury in the first instance, or if not given the option, will always "appeal" for a trial de novo unless deterred therefrom. These cases include offenses where conviction carries serious collateral consequences such as the revocation of one's driver's license, or revocation of parole, or the loss of one's right to carry on a trade or practice a profession.[43] They also included instances where

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43 This is particularly true in driving under the influence of intoxicating liquor cases where the reversal rate of district court convictions by juries is extremely high. See Boston Herald American, Feb. 24, 1973, which reported that in one session of Suffolk Superior Court "19 out of 22 defendants who appealed lower court findings of guilty imposed by judges were subsequently acquitted by juries of their peers!"

there exists a close issue of reasonable doubt or high probability that the integrity of the trial process would be impaired by multiple trials. If the defendant is allowed the option of a jury verdict in the first instance in these cases, the meaningless first tier proceedings will be eliminated, thereby increasing the efficiency of the state's two-tier system. On the other hand, the option procedure would preserve the state's interest as, statistically, most defendants would waive their right to a jury trial in the first instance.[44] Indeed, the only appreciable additional burden on the state would be the granting of jury trials in those cases where the accused would have been deterred by the interposition of trial by magistrate, a result

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44 The two-tier option procedure has been in operation in Rhode Island in the aftermath of State v. Holliday, 109 R.I. 93 (1971). Currently statistics show 97.2 percent of all defendants waive their right to a jury trial in the first instance. See also Baldwin v. New York, 399 U.S. 66, 74 ftn. 22 (1970).

of which Massachusetts cannot complain. This burden, in itself, is constitutionally insignificant in comparison to the burden placed on the states by this Court's decision in Baldwin v. New York, 399 U.S. 71, 74, ftn. 22 (1970), guaranteeing the accused "the important right to trial by jury where the possible penalty exceeds six months imprisonment". Accordingly, appellant submits that, on balance, the overall interest of Massachusetts in maintaining a two-tier structure will not be significantly impaired by its granting the accused an option of a jury verdict in the first instance.[45]

VI - MASSACHUSETTS' PROCEDURE OF FORCING AN ACCUSED TO "RUN THE GANTLET TWICE" VIOLATES THE DOUBLE JEOPARY PROVISIONS OF THE FIFTH AMENDMENT

In Benton v. Maryland, 395 U.S. 784, 794 (1969), this Court

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45 See Constitutionality of the De Novo Procedure, 55 B.U. Law Rev. 25, 54-59 (1975).

bound the states to the double jeopardy provisions of the Fifth Amendment by incorporating them in the Fourteenth Amendment. The underpinnings of these provisions are set forth by Justice Harlan in United States v. Jorn, 400 U.S. 470, 479 (1971):

> A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both these considerations are expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), where the Court noted that the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts

> to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Judged in light of these principles, Massachusetts' two-tier procedure inherently runs counter to the Fifth Amendment since it exposes the accused to the threat of multiple trials. Upon conviction in a lower court, the accused is subjected to the "embarrassment" of being found guilty and "appealing" in a criminal proceeding. While awaiting his "trial de novo" in the second tier, he is compelled "to live in a continuing state of anxiety and insecurity" while at the same time the conviction "[enhances] the possibility that even though innocent he may be found guilty". Additionally, the de novo trial in the second tier subjects the accused a second time to the "heavy personal strain which a criminal trial represents". Such a procedure is not consonant with limiting "the government to a single criminal proceeding to vindicate its very

vital interest in enforcement of criminal laws", and implicit in limiting the government to one crack at the defendant is limiting it to a proceeding which comports with Sixth Amendment standards.

The prohibitions of the double jeopardy clause not only bar punishing a defendant twice for the same crime, but bar placing him to his defense a second time, Ex Parte Lange, 18 Wall 163, 169 (1893). The prohibitions thus relate to a "potential or risk of trial and conviction, not punishment," Price v. Georgia, 398 U.S. 323, 329 (1970), emphasis added in Breed v. Jones, 423 U.S. ___, ___, (1975). For this reason, the double jeopardy clause bars the government from seeking to overturn an acquittal of the accused, United States v. Ball, 163 U.S. 662, 669-671 (1896), or from retrying the accused whose conviction is set aside on the grounds of "prosecutorial or judicial overreaching", United States v. Tateo, 377 U.S. 463, 468, ftn. 3 (1964); United States v. Jorn, supra, at pp. 484-485.

But a second trial is not barred in all circumstances. For instance, where a second trial results from a conviction being

set aside upon appellate review initiated at the defendant's "behest", retrial is not barred as the accused's "double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error," United States v. Jorn, supra, p. 484. Similarly, a second trial is not barred where the first trial is aborted due to a "manifest necessity," United States v. Perez, 9 Wheat. 579, 580 (1824), as such a result "would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide," United States v. Jorn, supra, at p. 480.[46] However, the short of

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46 In these circumstances, the "defendant's valued right to have his trial completed by a particular tribunal must... be subordinated to the public's interest in fair trials designed to end in just judgments", Wade v. Hunter, 336 U.S. 684, 689 (1949).

the matter is that "[t]he policy of avoiding multiple trials has been regarded as so important that exceptions to principle have been only grudgingly allowed", United States v. Wilson, 420 U.S. 332, 343 (1975).

Applying these principles to the Massachusetts procedure in question, it is observed that the de novo procedure forces the accused to the "risk" of two trials and as such runs counter to the policy underlying the double jeopardy provisions of "avoiding multiple trials", United States v. Wilson, supra, at p. 343. Besides this, the second trial in the de novo procedure is not a retrial at the defendant's request, although it is denominated as an "appeal", but rather, the second trial is at the government's "behest" as it cannot imprison the defendant without affording him a jury verdict. Such retrials, however, are barred under the principles enunciated in United States v. Ball, supra, p. 669-671.

Conversely, Richard I. Ludwig maintains that once he was placed in jeopardy, Massachusetts had no more right to intentionally deprive him of his right to a jury

verdict than it would have to deprive him of his right to counsel, or his right to confront his accusers, or his right to remain silent. Moreover, the intentional denial of the right to trial by jury is equivalent to "prosecutorial over-reaching" which prevents a fair trial from taking place, or to the declaration of a mistrial, absent a "manifest necessity" or without the defendant's consent, which prevents a verdict from being reached at all. By either analogy, retrial is barred by the double jeopardy provisions of the Fifth Amendment and accordingly, appellant submits that Massachusetts' procedure of forcing the accused to "run the gantlet twice" to obtain that which the Constitution guarantees is patently unconstitutional.

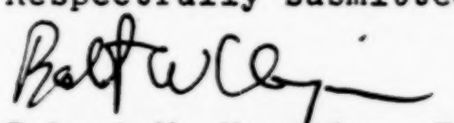
CONCLUSION

Appellant submits 1) that his conviction in the District Court of Northern Norfolk was unconstitutional since he was denied his Sixth Amendment right to a trial by jury in the first instance; and 2) that reprosecution in the District Court of Northern Norfolk

Six-Man Jury division was barred by the double jeopardy provisions of the Fifth Amendment.

WHEREFORE, appellant prays this Court to reverse the decision of the Supreme Judical Court.

Respectfully submitted,



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APPENDIX

Article XII of the Massachusetts Declaration of Rights:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

G.L. Ch. 218 Sec. 26

District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven.

G.L. Ch. 278 Sec. 18

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court

in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six, until he recognized to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other

provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall therafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A.

G.L. Ch. 218 Sec. 27A reads in part:

. . . . . .

Any defendant in a district court of Norfolk county found guilty of an offense or crime over which the district court have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of norther Norfolk or the district court of East Norfolk.

. . . . . .

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

Any defendant found guilty in any of said district courts of an offense or crime over which the district courts have orginal jurisdiction

under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a wiaver of any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of the superior court has and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant

may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

G.L. 278 Sec. 18A

Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve in the municipal court of the city of Boston has been made

under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has. and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicalbe to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear

for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly to the supreme judicial court by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.

G.L. Ch. 278 Sec. 20

Upon such appeal, the clerk of the district court shall transmit to the clerk of the superior court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses and no other papers need be transmitted.

G.L. Ch. 278 Sec. 24

If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and, if he is not then in custody, may issue process to bring him into court to receive sentence.

G.L. Ch. 278 Sec. 2

Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury drawn and returned in the manner provided for the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

G.L. Ch. 263 Sec. 6

A person indicted for a crime shall not be convicted thereof except by confessing his guilty in open court, by admitting the truth of the charge against him by his plea or demurrer or by the verdict of a jury accepted and recorded by the court or, in any criminal case other than a capital case, whether

begun by indictment or upon complaint
or any defendant in the housing
ocurt of the city of Boston or in
the housing court of the county
of Hampden in a criminal case, may,
if he shall so elect, when called
upon to plead, or later and before
a jury has been impanelled to try
him upon such indictment or complaint,
waive his right to trial by jury
by signing a written waiver thereof
and filing the same with the clerk
of the court, whereupon he shall
be tried by the court instead of
by a jury, but not, however, unless
all the defendants, if there are
two or more charged with offenses
growing out of the same single chain
of circumstances or events whether
prosecuted under the same or different
indictments or complaints shall
have exercised such election before
a jury has been impanelled to try
any of the defendants; and in every
such case the court shall have jurisdic-
tion to hear and try such cause
and render judgment and sentence
thereon.

G.L. Ch. 90 Sec.24 reads in part:

(2)(a) Whoever upon any way or in
any place to which the public has
a right of access, or any place
to which members of the public have
access as invitees or licensees,
operates a motor vehicle recklessly,

or operates such a vehicle negligently
so that the lives or safety of the
public might be endangered...shall
be punished by a fine of not less
than twenty dollars nor more than
two hundred dollars or by imprisonment
for not less than two weeks nor
more than two years, or both;...

(b) A conviction of a violation
of the preceding paragraph of this
section shall be reported forthwith
by the court or magistrate to the
registrar, who may in any event,
and shall unless the court or magistrate
recommends otherwise, revoke immediate-
ly the license or right to operate
of the person so convicted, and
no appeal, motion for new trial
or exceptions shall operate to stay
the revocation of the license or
right to operate. If it appears
by the records of the registrar
that the person so convicted is
the owner of a motor vehicle or
has exclusive control of any motor
vehicle as a manufacturer or dealer
or otherwise, the registrar may
revoke the certificate of registration
of any or all motor vehicles so
owned or exclusively controlled.

(c) The registrar, after having
revoked the license or right to
operate of any person under the
preceding paragraph of this section,
in his discretion may issue a new

license or reinstate the right to operate to him, if the prosecution of such person in the superior court has terminated in favor of the defendant, or, after an investigation or upon hearing, may issue a new license or reinstate the right to operate to a person convicted in any court of the violation of any provision of paragraph (a) of subdivision (2) of this section; provided, that no new license or right to operate shall be issued by the registrar to...any person convicted of violating any other provision of paragraph (a) of subdivision (2) of this section until sixty days after the date of his original conviction if for a first offense, or one year after the date of any subsequent conviction within a period of three years. But the registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, negligently so that the lives or safety of the public might be endangered.

Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-377.

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS.

Brief for the Appellee Commonwealth of Massachusetts.

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Act of November 20, 1645, 1 Hening's Statutes at Large 303 19n
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Acts of March 23, 1661, 2 Hening's Statutes at Large 41, 61, 72 20n
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Act of June 21, 1782, XIII Laws of Vermont 1781-1784
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The Book of the General Laws and Libertyes Concerning the Inhabitants of Massachusetts, Published in Cambridge According to an Order of the General Court (1660) 12, 14n

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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-377.

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for the Appellee Commonwealth of Massachusetts.

I. Opinion Below.

The opinion of the Supreme Judicial Court is reported at Mass. Adv. Sh. (1975) 1994, 330 N.E. 2d 467 (1975).

II. Jurisdictional Statement.

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(2). The appellant challenges the constitutionality of Massachusetts' two-tier or trial *de novo* criminal procedure, specifically arguing that the system has deprived him of his Fifth, Sixth and Fourteenth Amendment rights to a jury trial. This court noted probable jurisdiction on November 11, 1975. Subsequent to the filing of appellee's motion to dismiss for want of a substantial federal question, counsel for appellee became aware of the fact that appellant, Ludwig, had waived his right to jury trial in the Norfolk County six-man jury session (App. 1). Appellee concedes that this fact was not argued in the court below nor was it previously brought to the attention of this Court. However, since this fact may affect the existence or nonexistence of a controversy and thus the jurisdiction of this Court, the Commonwealth suggests that it is its duty to bring it to the Court's attention.

Although the Supreme Judicial Court has heard this case on the merits, this Court is not bound by the state court's determination of jurisdiction. *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). For this Court is bound by the Article III case or controversy requirement of the federal Constitution, while the state courts are not. *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Therefore, whether a question was adequately presented and decided in the state court is itself a federal question to be determined by this Court. *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938).

Appellee suggests that appellant's waiver of jury trial presents this case to the Court in a most unusual posture. Appellant argues that he has been denied his right to jury trial, yet, when jury trial was made available to him, he waived it.

Appellee suggests that this waiver of jury trial leaves the appellant without standing to raise the jury trial issue and

indicates that the appellant has no personal interest in receiving a jury trial, thus raising a serious question as to whether this case comes before this Court as a result of the appellant's interest in the case or as a result of the attorney's interest in obtaining an advisory opinion of this Court as to the constitutionality of the two-tier system.[1]

While this case does not involve an element of collusion as was present in *Lord* v. *Veazie*, 49 U.S. (8 How.) 251, 255 (1850), appellee suggests that the controversy over the trial *de novo* system is more "feigned" than actual insofar as the appellant is concerned. Appellee suggests that this Court's admonition in *Ellis* v. *Dyson*, 421 U.S. 426, 434 (1975), is appropriate. In *Ellis* the Court indicated that, in order to demonstrate a case or controversy, an actual controversy between the parties must exist — counsel's interest alone in an advisory opinion is not sufficient to satisfy the Article III requirement.

Therefore, appellee suggests that this Court reexamine its grant of jurisdiction in this case.

III. Constitutional and Statutory Citations.

The constitutional provisions and statutes involved in this case are the following:

Fourteenth Amendment of the United States Constitution, Section I;
Article XII, Constitution of Massachusetts;
Title 28, United States Code, Section 1257;

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[1] See *Commonwealth* v. *Ludwig*, Mass. (1975) (Mass. Adv. Sh. [1975] 1974); *Whitmarsh* v. *Commonwealth*, Mass. fn. 4 (1974) (Mass. Adv. Sh. [1974] 1403, 1408-1409 fn. 4) for a listing of such cases.

Massachusetts General Laws, Chapter 218, Section 27A;
Massachusetts General Laws, Chapter 278, Section 18;
and,
Massachusetts General Laws, Chapter 278, Section 18A.

Each is set forth in Appendix A, *infra*.

IV. Questions Presented.

1. Whether the Massachusetts two-tier criminal jury procedure complies with the Fourteenth Amendment requirement that a state afford to an accused the right to a trial by jury.

2. Whether the Massachusetts two-tier criminal jury procedure violates the defendant's right not to be twice put in jeopardy as guaranteed by the Fifth Amendment of the United States Constitution.

V. Statement of the Case.

Appellant Richard I. Ludwig was complained of in the District Court of Northern Norfolk in the County of Norfolk on February 1, 1974, for violation of Mass. G.L. c. 90, § 24(2)(a), commonly referred to as "driving to endanger." (App. 3a.) On that date the appellant (defendant) pleaded not guilty and the case was continued until February 25, 1974. (App. 1a.) After a further continuance appellant filed a motion for jury trial (App. 1a) which was denied and the appellant was found guilty and fined $20 on March 11, 1974. (App. 1a.) On that date the appellant "appealed" to the District Court of Northern Norfolk six-man jury. (App. 1a.) The appellant filed a motion to dismiss in the District Court of Northern Norfolk six-man jury alleging that his District Court conviction was void for being in contravention of the Constitution of the United States. (App. 5a-6a.) The motion was denied on April 5, 1974. (App. 1a.) The appellant then waived his right to jury trial and was found guilty; payment of a $20 fine was stayed. (App. 1a.) The appellant then appealed to the Supreme Judicial Court of the Commonwealth by way of a bill of exceptions. (App. 9a-10a.) The exceptions were overruled on June 12, 1975. (App. 11a.)

On September 10, 1975, appellant filed an appeal to the United States Supreme Court from the order of the Supreme Judicial Court. This Court noted probable jurisdiction on November 11, 1975.

VI. Summary of Argument.

1. The right of jury trial in criminal cases is a fundamental right, guaranteed to defendants in state courts by virtue of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). However, *Duncan* did not make the rule of *Callan* v. *Wilson*, 127 U.S. 540 (1888), applicable to the states; that is, first-instance-every-instance jury trial is not mandatory in all state criminal proceedings. *Duncan* enunciated a right, without definitively establishing the mode in which the right is to be afforded state defendants, and the Massachusetts mode of criminal jury trial procedure complies with the *Duncan* requirement because it is a basic and fundamental mode; that is, a mode which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense. The Massachusetts mode is clearly basic and funda-

mental because it antedated, and remained viable during, the colonial-constitutional period. Additionally, several states, including New Hampshire, Vermont, Connecticut, Rhode Island and Maine (as a District) employed a similar trial *de novo* procedure during the same period as a means of furnishing jury trial to defendants within their jurisdictions. Finally, the Massachusetts procedure is comparable to contemporary developing jury procedures in several states, and this Court has considered contemporary state practice as a principle of Fourteenth Amendment application.

2. This Court in the cases of *Duncan* v. *Louisiana*, *supra*, *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), analyzed certain traditional aspects of the jury-trial right with respect to the function and purpose of a jury in American jurisprudence. Appellee suggests that the primary purpose of the jury is to prevent governmental oppression by the interposition of the commonsense judgment of laypersons between an accused and his accuser, and by effecting community participation in the process of adjudication of guilt or innocence of an accused. Appellee further suggests that an accused in Massachusetts has an absolute right to a jury, regardless of the "petty nature" of his offense, and that the *de novo* procedure, though possibly inconvenient to some, is beneficial to the large majority of defendants and contraindicates a suggestion of governmental oppression. The Massachusetts jury procedure fulfills the purpose and function of criminal jury trial in America.

3. The appellant's alternative contention with respect to the Double Jeopardy Clause is controlled by this Court's decisions in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Colten* v. *Kentucky*, 407 U.S. 104 (1972). In Massachusetts, as was the case in Kentucky, a defendant in a criminal trial "appeals" to the second level of the two-tier system to receive a trial "in the criminal courts of general jurisdiction where the

full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 407 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second tier is absolute, and, at the defendant's behest, the lower court proceedings are "wiped out" entirely. On the basis of this Court's previous decisions, Massachusetts suggests that its *de novo* trial procedure does not violate the Double Jeopardy Clause.

VII. Argument.

The Massachusetts Criminal Jury Procedure Adequately Complies with the Fourteenth Amendment Requirement that an Accused be Afforded the Right to Trial by Jury in State Criminal Proceedings.

A. *The Massachusetts Procedure Provides Jury Trial in a "Basic and Fundamental" Mode.*

In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court, in examining a state's procedure which dispensed entirely with a jury trial in serious criminal cases,[1] stated the following:

> . . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. (Footnote omitted.) 391 U.S. at 149.

[1] "None of these cases [*Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934)], however, dealt with a State which had purported *to dispense entirely* with a jury trial in serious criminal cases." 391 U.S. at 154-55. (Italics added.)

The Commonwealth of Massachusetts suggests, at the outset, that *Duncan* did not establish a requirement that state jury procedures conform to all previous decisions of this Court interpreting the right to jury trial guaranteed to defendants in criminal cases in federal courts by Article III of the United States Constitution and by the Sixth Amendment.[3] This argument is written upon that understanding and assumption, with the proviso that, if this Court is to hold that *Duncan* requires the states to conform to the cases that determine federal jury-trial right, then the doctrine of *Callan* v. *Wilson*, 127 U.S. 540 (1888), should be reassessed.[4] In brief, appellee argues that *Duncan* secured a right, without defining precisely the mode in which it shall be enjoyed.[5]

[3] The appellee recognizes that its position is not free from contrary interpretation and suggests that the Massachusetts Supreme Judicial Court has reviewed the alternatives and that the same are contained in succinct and fair summary in the case of *Whitmarsh* v. *Commonwealth*, *supra*, at 1412-16. We concur with the views of Mr. Justice Powell as expressed in his concurring opinion in *Johnson* v. *Louisiana*, and *Apodaca* v. *Oregon*, 406 U.S. 356, 369-77 (1972), wherein he stated:

> But it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes. This Court has said, in cases decided when the intendment of that Amendment was not as clouded by the passage of time, that due process does not require that the States apply the federal jury-trial right with all its gloss. *Id.* at 371.

[4] . . . It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. . . . 391 U.S. at 158-59, n. 30.

[5] In *Jones* v. *Robbins*, 8 Gray, 329 (1857), in which the principle question involved was whether a person could be sentenced to state prison without a grand jury indictment, the Supreme Judicial Court said:

Appellee suggests that the conclusion of *Duncan* seems to derive from an examination and application of criteria which had previously served as the basis for this Court's determina-

> The last clause, which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a "capital" or "infamous punishment," excepting for the government of the army and navy, without trial by jury, is somewhat more explicit than the preceding clause, "judgment by his peers," and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to ensure his appearance and to abide the judgment of the court appealed to. this is a necessary inconvenience, as is also the delay of the trial till the sitting of such court they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other states. *Emerick* v. *Harris*, 1 Binn. 416. *Murphy* v. *People*, 2 Cow. 815. *Jackson* v. *Wood*, 2 Conn. 819. *Beers* v. *Beers*, 4 Conn. 535. *Sullivan* v. *Adams*, 3 Gray 477. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury. *Id.* at 341-42.

tion that various rights extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings were also to be protected against state action by the Fourteenth Amendment. 391 U.S. at 147-49. Specifically, the Court revisited earlier "Fourteenth Amendment" decisions, and said:

> . . . [The question] has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932);[6] whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). . . .

391 U.S. at 148-49.

The Court noted that recent cases had varied from the "essence of a scheme of ordered liberty" test (*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)), and

> . . . proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is,

[6] Quoting from *Herbert* v. *Louisiana*, 272 U.S. 312, 316 (1926).

> a procedure is necessary to an Anglo-American regime of ordered liberty. . . .[7]

391 U.S. at 149-50 n. 14, and further,

> . . . Of each of these determinations [[8]] that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States. *Ibid.*

Appellee suggests that the Court then, in *Duncan*, based upon this initial definition of "fundamental," further refined the "Fourteenth Amendment" application criteria in terms of (1) historical analysis of jury trial in criminal cases and (2) contemporary practices among the states.[9] Appellee now

[7] The Court referenced to the following cases: *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Griffin* v. *California*, 380 U.S. 609 (1965); *Robinson* v. *California*, 370 U.S. 660 (1962); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *In re Oliver*, 333 U.S. 257 (1948); *Pointer* v. *Texas*, 380 U.S. 400 (1965); and *Washington* v. *Texas*, 388 U.S. 14 (1967).

[8] Cases in footnote 7, *supra*.

[9] The Court reviewed the history of trial by jury in criminal cases by reference to historical treatises and legislative history of the debates and amendments surrounding various federal provisions, and indicated, as well, that the constitutions adopted by the original states were examined. 391 U.S. at 151-53. The Court also referenced contemporary state law with respect to the right to jury trial in serious criminal cases. 391 U.S. at 154.

argues and suggests to this Court that the criteria of Fourteenth Amendment *application* may be equally relevant for Fourteenth Amendment *justification*, and that the Massachusetts jury procedure is, itself, a basic and fundamental procedure which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense, as well as in the light of contemporary developing jury procedures of several American States. In brief, if the Fourteenth Amendment requires that a limitation be imposed, or a procedure be secured, upon these criteria, Massachusetts suggests that its existing procedure can be justified as adequate by the same criteria, providing a basic and fundamental right in a basic and fundamental mode.

1. The Colonial-Constitutional Experience.

The Massachusetts practice of affording criminal defendants a jury trial after preliminary adjudication by a judge (or magistrate) acting alone was first codified in 1647 when the General Court enacted a provision affording all persons the "libertye" of an:

> Appeal from the sentence of one magistrate . . . and if the point of appeal be in matter of law then to be determined by the bench; if in matter of fact by the bench and jury.

THE BOOK OF THE GENERAL LAWS AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS, PUBLISHED IN CAMBRIDGE ACCORDING TO AN ORDER OF THE GENERAL COURT 2 (1660). Our research of legislation enacted since 1647 discloses that this provision has never been repealed and that the trial *de novo* procedure, with some modification, has continued in use from

that date to the present.[10] See *Whitmarsh* v. *Commonwealth*, Mass. Adv. Sh. (1974) at 1411; *Jones* v. *Robbins*, 8 Gray, 329, 341 (1857). The right of "appeal" was clearly not an unfettered one in colonial practice and has been the subject of critical commentary. Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harv. L. Rev. 917, 938-44 (1926).[11]

The exact parameters of the procedure in early practice as regards magistrates' subject-matter jurisdiction and limitations upon the punishments that might be imposed are elusive and, in some respects, difficult to establish categorically in modern terms due to the fragmented approach of early legislators in codifying the criminal law and incommensurabilities arising

[10] Chapter 51, § 3 (1783), Mass. Stat.; c. 70, § 1(1831), Mass. Stat.; c. 85, § 28, c. 87, § 36, c. 138, § 1 (1836), Rev. Mass. Stat.; c. 166, § 2 (1845), Mass. Stat.; c. 31 (1849), Mass. Stat.; c. 116, § 32, and c. 173, §§ 1, 4 (1860), Mass. Gen. Stat.; c. 154, § 39, and c. 155, §§ 58, 61 (1882), Mass. Pub. Stat.; c. 396, § 47 (1893), Mass. Stat.; c. 431 (1894), Mass. Stat.; c. 490, § 3 (1897), Mass. Stat.; c. 219, § 22 (1902), Mass. Rev. Laws; c. 319 (1905), Mass. Stat.; c. 652 (1913), Mass. Stat.; and c. 216, § 4 (1929), Mass. Stat.

[11] However, we suggest that the authors' research does not seem to include the historical fact that many of the impediments to an actual exercise of the jury-trial right had been eliminated during the colonial period and prior to the framing of the Massachusetts and Federal Constitutions. See, *e.g.*, c. 4, Acts and Resolves of 1724-25 (permitting amendment to the appeal so as to preclude dismissal on technical grounds); c. 15, Acts and Resolves of 1741-42 (eliminating requirement that a writing containing the reasons of appeal be filed or produced). The latter provision reduced costs based upon the number of pages filed. See c. 23, Acts and Resolves of 1775-1776. Also, appellee has calculated that forty of the fifty-nine shillings were for jurors fees and that these fees need not have been advances, nor would have been assessable against the defendant, in the event of an acquittal. In general, see preambles to these ameliorative acts for reflection of a legislative concern that the appeal right be unfettered.

from social, economic, and technological change. However, after a review of the legislation of the colonial and constitutional periods, it appears fair to state that, at least with respect to the core offenses against the public order and peace, against property, and against persons, the matters entrusted to the trial *de novo* procedure then, and those entrusted to the procedure now, are quite comparable. For example, during the colonial and constitutional experience, justices of the peace, sitting outside the General Sessions of the Peace, were authorized to proceed to a preliminary adjudication in cases where the offense was: participation in a riotous or tumultuous assembly where a building was torn down;[12] a liquor law violation;[13] an assault and battery not of a "high and aggravated nature";[14] receiving stolen government property;[15] or a petty larceny or offense of similar degree.[16]

[12] Chapter 17, Acts and Resolves of 1750-51 (maximum punishment: whipping, one year imprisonment in the county house of corrections at hard labor, and another public whipping every three months during the term of imprisonment); c. 26, Laws and Resolves of 1794 (re-enactment with some modification). See *Commonwealth* v. *Twombly*, Boston Municipal Court 1830, reported in Thatcher's Criminal Cases 225 (1845) (Thatcher, J., reviewing common-law and legislative history of the offense.)

[13] Chapter 6, Acts and Resolves of 1742-43 (maximum fine, twenty pounds sterling).

[14] Chapter 51, Laws and Resolves of 1783.

[15] Chapter 36, Acts and Resolves of 1776-77 (maximum fine: three times value of property stolen).

[16] The Book of the General Laws and Libertyes of the Inhabitants of Massachusetts, *supra*, at 7 (maximum punishment in 1660: whipping and fine of up to forty shillings; but, by the end of the constitutional period, the maximum fine had been increased to twelve hundred eighty shillings. Chapter 37, Acts and Resolves of 1779-80).

Today, the district and municipal courts of Massachusetts, the successor courts to the General Sessions of the Peace, continue to have jurisdiction over these offenses which still are among those that mark the jurisdictional limits of the authority of these courts. See Mass. G.L. c. 218, § 26; c. 267, § 7; c. 265, § 13A; c. 266, §§ 30, 60.

The New Hampshire two-tier jury procedure has been traced by that state's Supreme Court to a 1646 law of the Massachusetts Colony, *State* v. *Jackson*, 69 N.H. 511 (1898), although it is clear that the New Hampshire practice enjoys a history separate and apart from the Massachusetts law:

> . . . In 1679, immediately after Charles II discontinued the jurisdiction of Massachusetts in the New Hampshire territory, the general assembly of the Province of New Hampshire enacted, "That Any one of the Council [that is, the council provided for by the King's Commission to President Cutt] may hear & determine such smaller Thefts & pilferings, as exceed not the damage or fine of fforty shillings; or penalty of Stocking or Whipping, not exceeding Ten stripes; or only legal admonition, as he shal see cause; Saving liberty of Appeal to the Delinquent." 1 Laws, *ed.* of Batchellor, editor and compiler of Early Province and State Papers, *p.* 17, *s.* 7. By another enactment this jurisdiction was extended to all criminal cases

Our research has disclosed that long-term imprisonment was rarely imposed in colonial Massachusetts. The one exception appears to be the three-year term authorized for mailing a threatening letter to extort. Chapter 7, Acts and Resolves 1749-50. Otherwise, excepting for the imposition of heavier fines, the penalty of next severity (outside of the jurisdiction of a justice of the peace) appears to have been the death penalty. See, *e.g.*, c. 2, Acts and Resolves of 1721-22 (death penalty for second offense of trading with the Indians); and c. 18, Acts and Resolves 1736-37 (death penalty for third offense of theft).

in which the punishment did not exceed that above mentioned. *Ib.*, *p.* 22, *s.* 24.

69 N.H. at 514.

Several decisions of the New Hampshire court seem to best describe the office of the justice of the peace in New Hampshire, the criminal jurisdiction of the justices at the time of the formation of the New Hampshire Constitution in 1784, and the modification of the jurisdiction of the justices during the period following the revolution. See *Opinion of the Justices*, 41 N.H. 550 (1860); *State* v. *Ray*, 63 N.H. 406 (1885); *State* v. *Griffin*, 66 N.H. 326 (1890); *State* v. *Gerry*, 68 N.H. 495 (1896); *State* v. *Jackson*, *supra*; *Wilmarth* v. *King*, 74 N.H. 512 (1908); *State* v. *Ring*, 106 N.H. 509 (1965); *State* v. *Despres*, 107 N.H. 297 (1966). And, although the cases have concerned, in large measure, the scope of jurisdictional authority which may be delegated to the municipal or district court in view of Article XV of the Bill of Rights of the New Hampshire Constitution,[17] it seems fair to say that the New Hampshire court has never questioned the historical precedent of two-tier criminal adjudication, "provided the right to a trial by jury, such as the constitution intends, is secured to every one in the last resort . . . ," *Opinion of the Justices*, 41 N.H. at 552, and "[f]inal judgment cannot be enforced for the commission of any police offence, however trivial, until the appellant has been convicted by a jury of his peers." *State* v. *Ray*, 63 N.H. at 407.

[17] The provision of the constitution relied upon is as follows:

> [N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

N.H. Const., Bill of Rights, art. 15.

In and prior to 1784, a New Hampshire justice of the peace had general authority to try and determine those criminal offenses that were punishable by a fine not exceeding forty shillings, by whipping or by sitting in the stocks. *Wilmarth* v. *King*, 74 N.H. at 513. However, specific statutes authorizing the punishment of six months' imprisonment by a justice of the peace are to be found, even antedating the constitution. New Hampshire Laws, 63, 64, 65 (1780). See *Wilmarth* v. *King*, *supra*. See also New Hampshire Laws, c. 45, §§ 3, 4 (1828). Finally, the appellee suggests that the nature of the following offenses within the jurisdiction of the justices of the peace should be noted (these examples all being laws of 1771 cited in *State* v. *Jackson*, 69 N.H. at 516-17): drunkenness; stealing (where the damage did not exceed forty shillings); "affrayers, rioters, disturbers or breakers of the peace . . ."; striking or smiting another; and "assaulting a woman in the fields, streets or lanes. . . ."[18]

Decisions of the Supreme Court of Vermont, and some available portions of early Vermont legislation, establish that two-tier criminal jury procedures were a part of the constitutional experience in Vermont.

> The first constitution of Vermont was adopted in 1777. The act of the legislature of 1786 empowered justices of the peace to try certain pleas and actions of a criminal nature, and limited their jurisdiction. It also provided that every person . . . aggrieved by the sentence of a justice in a criminal action, might, on giving security, remove the cause by *certiorari* to the supreme court

[18] The fines and penalties for these offenses are contained in the opinion of the court at 69 N.H. 516-17.

> (where there was then a trial by jury,) there to be tried on the merits. The act of 1789 allowed an appeal from the judgment and sentence of a justice to the county court in all criminal causes.

State v. *Peterson*, 41 Vt. 504, 520-21 (1869). The "county court" was a jury court. See, "An Act Regulating Juries and Jurors, 22 Feb. 1779," reprinted in XII Laws of Vermont 1777-1780, at 117 (Soule, ed. 1964). See also *Lincoln* v. *Smith*, 27 Vt. 328 (1855); Act of June 21, 1782, reprinted in XIII Laws of Vermont 1781-1784, at 102-03 (Williams, ed. 1965).

Our research discloses that the states of Connecticut and Rhode Island and the District of Maine similarly employed a trial *de novo* procedure for furnishing, during the colonial period, jury trial to criminal defendants who were tried first before a magistrate or justice of the peace without a jury. In Connecticut that procedure seems to date from at least 1702. See *Goddard* v. *State*, 12 Conn. 448, 454 (1838); Colonial Records of Connecticut 1689-1706, at 545. In Rhode Island our earliest reference is 1718. Acts and Laws of Rhode Island, 1663-1767, at 36, 44 (1767).[19] And, in the District of Maine, 1783. See *State* v. *Sklar*, 317 A. 2d 160, 170 (Me. 1974); *Johnson's Case*, 1 Me. 230 (1821). There is also evidence that

[19] Again, the appellee requests that the Court note the nature of the offenses for which the trial *de novo* procedure was provided in jurisdictions where the defendant was given a general right to a trial by jury subsequent to a preliminary adjudication by a magistrate or magistrates. For further example, in the colonial practice of Rhode Island, a preliminary summary adjudication was provided for in cases of a theft not exceeding ten pounds sterling (for which the defendant might be punished by "whipping, fining, and banishing" just as if the conviction had been by a jury verdict at the General Sessions of the Peace), assault and battery, and firing a gun or throwing fireworks into a crowd. Acts and Laws of Rhode Island 1663-1767, at 41, 64, 120 (1767).

a trial *de novo* procedure for providing a jury trial was employed in some form in Pennsylvania, Virginia and Delaware during the colonial and constitutional periods.[20]

[20] Our research of Pennsylvania legislation of the colonial and constitutional periods does not disclose a uniform jury practice in the case of all criminal offenses. There was, however, provision for a general right to appeal to the Quarter Sessions for a jury trial in quasi-civil proceedings. Act of February 21, 1736, reprinted at 4 Statutes at Large of Pennsylvania 291 (limiting the jurisdiction of justices of the peace at five pounds sterling, with a right of appeal to a jury in cases involving over forty shillings).

In addition, a trial *de novo* procedure for furnishing a jury trial was, with fair consistency, provided for criminal offenses of intermediate seriousness. See, *e.g.*, Act of August 21, 1719, reprinted at 3 Statutes at Large of Pennsylvania 229, 233-34; Act of February 24, 1721, reprinted at 3 Statutes at Large of Pennsylvania 246 (petty larceny punishable by twenty shilling fine, whipping and imprisonment); Act of August 15, 1730, reprinted at 4 Statutes at Large of Pennsylvania 194 (blocking a river); Act of October 4, 1788, reprinted at 13 Statutes at Large of Pennsylvania 160 (commercial fishing law violations punishable by a five-pound fine or two months' imprisonment); Act of April 22, 1794, reprinted at 15 Statutes at Large of Pennsylvania 110, 115-16 (keeping a gambling establishment punishable by a fine of twenty-six dollars).

The use of the trial *de novo* procedure for furnishing a jury trial where it is constitutionally required in quasi-civil actions has been considered and affirmed by the Pennsylvania Supreme Court. *Emerick* v. *Harris*, *1 Binney*, 416 (1808).

The cornerstone of Virginia's criminal justice system was the monthly court which was formed in 1623 with the appointment of eight designated commissioners, of whom three were to be a quorum. Act of March 20, 1629, reprinted at 1 Hening's Statutes at Large 132 (1823); Act of March 1, 1631, reprinted at 1 Hening's Statutes at Large 168-69 (increasing jurisdiction to causes involving up to five pounds sterling excepting those involving life or limb). In 1642 the monthly courts became county courts and a single commissioner was given cognizance of causes involving twenty shillings or two hundred pounds of tobacco or less. Act of June, 1642, reprinted at 1 Hening's Statutes at Large 273. Also, in 1642, all persons were given what appears to have been an unqualified right to a jury trial. *Ibid.*

In 1645 the Virginia "county courts" were given jurisdiction of all cases and ordered to make jury trials available. Act of November 20, 1645, reprinted at 1 Hening's Statutes at Large 303. It is not clear how the last

In partial summary, although there may have been no strict consensus among the colonies as to the mode in which the right to jury trial was to be afforded, the trial *de novo* mode for offenses of intermediate seriousness was a very substantial

three acts were reconciled in practice. Possibly, a trial *de novo* procedure had already been implimented. In any event, a trial *de novo* procedure for furnishing a jury trial was formally implemented in 1658. Act of March 13, 1658, reprinted at 1 Hening's Statutes at Large 435. Appellee notes that the subject matter jurisdiction of one and two commissioners at a preliminary adjudication was increased to three hundred fifty and one thousand pounds of tobacco respectively with the implementation of these procedures. We must further note that the Virginia legislation during this period did not distinguish between criminal and civil actions procedurally, all penal laws being enforced through *qui tam* proceedings involving informers as well as victims.

This practice was to be short-lived, however. In 1661 a new colonial government, averring a reverence for the common law of England, adopted that law, repealed all previous laws, provided that the commissioners were from then on to be called "justices of the peace" and have the same powers as English justices, and reduced their jurisdiction in summary proceedings to causes involving twenty shillings or two hundred pounds of tobacco, or less, in which causes their judgment was to be "final." Acts of March 23, 1661, reprinted at 2 Hening's Statutes at Large 41, 61-62, 72. It does not appear that Virginia again established a trial *de novo* procedure until the post-constitutional period.

The post-constitutional procedure was held valid under the Sixth Amendment and the Virginia Constitution on the ground that the right to a jury trial is afforded if an unfettered right of appeal is provided. *Brown* v. *Epps*, 91 Va. 726 (1895) (distinguishing *Callan* v. *Wilson*, *supra*, on the ground that Article III, Section 2, of the United States Constitution requires that all federal trials "shall be by jury" which literally leaves no room for any adjudication in the absence of a jury).

Information on early Delaware practice is quite sparse. Much of the early penal legislation is somewhat cryptic. It is clear that the Delaware justices of the peace had jurisdiction over some offenses of intermediate seriousness, and although a right to appeal for a trial by jury in the quarter sessions is not expressly given for all offenses, the right is expressly afforded in the more comprehensive legislative enactments and in language that suggests the right may have been generally available. Laws of the Government of New Castle, Kent and Suffolk upon Delaware 1700-1749, at 139, 159, 184, 194, 218 (Franklin and Hall, eds. 1752); Laws of the Government of New Castle, Kent and Suffolk upon Delaware 1753-1762, at 146, 316, 321, 323 (Adams, ed. 1763) (with October 1763 Session to October 1774 Session Supplements).

Records of legislative enactments, or case law, or both, concerning the colonial and constitutional periods were available to appellee for New York, Maryland, New Jersey and Georgia. A search of this material did not disclose the use of a trial *de novo* procedure for providing a jury trial or a provision for a general right to a jury trial in these states. Complete records of the colonial practice of South Carolina and North Carolina were not available. However, it is known that North Carolina provided a trial *de novo* procedure for offenses of intermediate seriousness as early as 1868. See *State* v. *Powell*, 86 N.C. 640, 642 (1882).

part of the colonial experience and was, appellee suggests, clearly within the understanding of the framers of our Federal Constitution. Indeed, we suggest that the *de novo* mode was within the experience and understanding of those whose precepts as regards the jury-trial right were the more developed. in the "*de novo* states" it appears that jury trial was provided for *all* offenses, petty and serious.

2. Contemporary State Practice.

The contemporary practices of the states with respect to jury trial have been the subject of examination by this Court in several recent cases, notably: *Duncan* v. *Louisiana*, *supra*; *North Carolina* v. *Pearce*, *supra*; *Baldwin* v. *New York*, 399 U.S. 66 (1970); *Williams* v. *Florida*, *supra*; *Apodaca* v. *Oregon*, *supra*; and *Colten* v. *Kentucky*, *supra*. And our examination of the parties' briefs in these cases indicates that the Court has received considerable analysis, on a state-by-state basis, of the criminal jury procedures of most of the states. See, *e.g.*, *Duncan* v. *Louisiana*, *supra*; Brief for Appellant, pp. 3a-8a; Brief for Appellee, pp. 101-113.

The appellee has examined contemporary state practice and suggests that a *de novo* procedure, comparable to the Massa-

chusetts procedure, is currently being utilized by several states including, at least Arizona,[21] Arkansas,[22] Alabama,[23] Kansas,[24] North Carolina,[25] New Hampshire,[26] Pennsylvania[27] and

[21] Ariz. Rev. Stat. §§ 22-371 through 22-374 establish the *de novo* apeal to the superior court from the final judgment of a justice or police court; however, the "appeal" is not always *de novo*, *i.e.*, if a transcript of the proceedings in the lower court has been maintained, the "appeal" may be upon that record based upon the superior court's evaluation of the sufficiency and condition of that record. The jurisdiction of the justice of the peace courts is contained in Ariz. Rev. Stat. § 22-301.

[22] Ark. Stat. §§ 44-115, -116, -501 and -509 establish the *de novo* procedure of appeal to the circuit court. See *Cableton* v. *State*, 243 Ark. 351, 359 (1967). However, the initial jurisdiction of the lower "tier" appears to be restricted to violations of municipal by-laws and ordinances. See Ark. Stat. §§ 44-115, -116.

[23] See Ala. Const. art. I, §§ 6, 11 (1901). The jurisdiction of the first tier (the "county court") is defined in Ala. Code Ann. tit. 13, § 321; see *Leonard* v. *State*, 43 Ala. App. 454 (1966), and Ala. Code Ann. tit. 13, § 326. The latter citation appears to define the *de novo* right. Appellee also notes that second degree manslaughter appears to be a misdemeanor in Alabama and subject to adjudication, in the first instance, at the lower court level without a jury.

[24] The *de novo* procedure appears in Kan. Stat. Ann. §§ 22-3609, -3610, reenacted, c. 179, Acts of 1975. See *State* v. *Parker*, 213, Kan. 229, 230, 233, 235 (1973).

[25] N.C. Gen. Stat. §§ 7A-196, -271, -272.

[26] The trial *de novo* procedure and enabling legislation is explained in *State* v. *Despres*, 107 N.H. 297 (1966). See N.H. Rev. Stat. §§ 502:18, 502A:11, 502A:12. The jurisdiction of the district or municipal first tier is limited to crimes for which the maximum penalty is fine not exceeding one thousand dollars or imprisonment not exceeding one year or both. *Ibid.*

[27] Pa. Code tit. 234, Rules 51, 67, 6001, 6006, 6010. Pa. R. Crim. P. 67(e), tit. 19. The municipal court has jurisdiction of all criminal offenses where the punishment that might be imposed is five years or less. After the

Virginia.[28] Appellee acknowledges that the ostensible jurisdiction of the Massachusetts "first tier" seems to represent (with the possible exception of Alabama) the extreme with respect to powers of fines and incarceration. However, the concept of *de novo* adjudication, in a procedure comparable to the Massachusetts system in respects other than potential sentencing, seems to be recognized as a legitimate form of jury procedure by a substantial number of states.[29]

imposition of sentence the municipal court judge shall notify the defendant of his right to appeal for a trial *de novo* by jury. If the defendant does appeal, the district attorney must proceed to a grand jury and, upon return of an indictment, proceedings continue as in other cases involving indictable offenses.

[28] Va. Code Ann. §§ 16.1-123, -124, -125, -132, -136. See *Commonwealth* v. *Bass*, 113 Va. 760 (1912). In Virginia, any person convicted in a court not of record, of an offense not felonious, has a right to a *de novo* jury trial in a circuit court (even if the conviction resulted from guilty plea, rather than trial).

[29] Appellee has suggested, and, hopefully established, that the subject matter or "core offenses" cognizable by colonial justices of the peace are substantially comparable to the subject matter jurisdiction of the present Massachusetts District Courts and the Boston Municipal Court. It does appear, however, that the *ostensible* authority of the modern justice has been substantially expanded in terms of money fine amount and potential time of incarceration. This is, of course, an important consideration, especially in view of the recognized distinction between "petty" and "serious" offenses and the doctrine of *Callan* v. *Wilson*, *supra*. Appellee argues, however, that the practical expansion of "lower tier" jurisdiction is justified by social, technological and procedural advance, as well as by need, but, further, that the *actual* expansion is far less than the *apparent* expansion.

The expansion of magistrates' jurisdiction was examined by the New Hampshire Supreme Court in *State* v. *Jackson*, *supra*. That court noted that, with some exceptions, in 1777 the largest fine which a New Hampshire justice was authorized to impose was forty shillings, and that the longest definite term of imprisonment was three months, ". . . authority being given

B. *The Massachusetts Jury Procedure Effects this Court's Enunciation of the Purpose and Function of Jury Trial in America.*

In addition to an examination of historical and contemporary practices among the states, the Court, in recent cases touching upon the nature of the jury right, has studied the purpose and function of the jury in contemporary society. In *Duncan* v. *Louisiana*, *supra*, the Court noted:

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in certain cases to imprison in the house of correction for an indefinite term; . . ." 69 N.H. at 518. That court, in 1898, undertook to interpret the 1777 sentencing power in terms of subsequent authority of the justices in 1791, 1799, 1805, 1815, 1822, etc. The interpretation and examination took this form:

> In 1781, the Spanish milled dollar reckoned as six shillings, and other silver and gold in proportion, were made legal tender on all contracts made after that time, and for all debts contracted prior to the last day of January, 1777. Laws, *ed.* 1789, *pp.* 185, 187. The constitution provides that, in all cases where sums of money are mentioned in it, "the value thereof shall be computed in silver at six shillings and eight pence per ounce." Laws, *ed.* 1789, *p.* 30. Const., *art.* 96. It seems from the act of February 12, 1785, that the value of gold at that time was five pounds six shillings eight pence per ounce, or, when compared with silver, as sixteen to one. Laws, *ed.* 1780, *p.* 338; *ed.* 1789, *p.* 187. The money of account was changed from the English system to the decimal or United States system in 1792 (Act of Congress of April 2, 1792, *c.* 16, *s.* 20; Laws, *ed.* 1797, *p.* 267); and the first United States silver dollar was coined in 1794. This dollar contained 371¼ grains of pure silver, — about the same quantity as the Spanish milled dollar. According to the rule of the constitution, forty shillings equaled six ounces of silver, — a quantity sufficient to make seven and three fourth United States Silver dollars.

69 N.H. at 518-19.

Appellee includes this New Hampshire analysis primarily to establish that a dollar-for-dollar comparison is difficult, if not totally impractical. Nevertheless, appellee asks that this Court, if such comparison be made, take note

> . . . Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* [*Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934)] took no note of past or current developments regarding jury trials, [and] did not consider its purposes and functions. . . . 391 U.S. at 155.

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of the fact that the Chief Judge of the Vermont County Court was paid at the rate of ten shillings per day in 1780, and that an attorney in that court received for his labor four shillings per day. "An Act for Regulating Fees Novr. 3RD 1780" reprinted in XII Laws of Vermont 1777-1780, at 206. (Soule, ed. 1964).

And, should this Court compare the extreme of the present authority of a Massachusetts District Court Judge to imprison, the appellees ask that the following statement of the Rhode Island Supreme Court be noted:

> Suffice it to say that at the time of the adoption of the State constitution [1843] imprisonment in the State prison was the gravest punishment known to the law of the State for crimes less than capital crimes, and that it had succeeded to the former punishments of whipping, branding, and standing in the pillory.

State v. *Nichols*, 27 R.I. 69, 82 (1905).

Moreover, although the District Court has jurisdiction over all felonies punishable by imprisonment in the State prison for up to five years, in fact the District Court may sentence only to the local jail or House of Correction in which the maximum term of imprisonment is two and one-half years. Mass. G.L. c. 218, § 27 (1958); c. 279, § 23.

In summary, appellee argues that the propriety of the present Massachusetts system should not be diluted because of ostensible, rather than actual, enlargements of jurisdiction as originally entrusted to justices of the peace. Appellee asks the Court to recognize that the Massachusetts procedure is not an imaginary scheme, but a functioning and developing process with a three-hundred-year history, presently accomodating in excess of one million criminal matters each year. *Seventeenth Annual Report to the Justices of the Supreme Judicial Court* (1973) at 52.

The Court then stated the purpose (and its components) of the guarantee of jury trial in the Federal and State Constitutions: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." (Citing *Singer* v. *United States*, 380 U.S. 24, 31 (1965).) 391 U.S. at 155. The Court continued with categories of potential governmental oppression based upon history and experience:

1. unfounded criminal charges brought to eliminate enemies;
2. judges too responsive to the voice of higher authority;
3. protection against arbitrary action;
4. the corrupt and overzealous prosecutor;
5. the complaint, biased, or eccentric judge;
6. the exercise of plenary powers over the life and liberty of the citizen by one judge or a group of judges;
7. unchecked power; and,
8. arbitrary law enforcement,

concluding, *inter alia*, that: "Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." 391 U.S. at 158. See also *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court considered the question whether the constitutional guarantee of a trial by "jury" necessarily required trial by exactly twelve persons, rather than some lesser number — in *Williams*, six. 399 U.S. at 86. In deciding the issue the Court stated:

> . . . The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. 399 U.S. at 99-100.

The Court then reviewed the statement of jury purpose contained in *Duncan*, concluding:

> . . . Given this purpose [to prevent oppression by the government], the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. 399 U.S. at 100.

The Court determined that there was little reason to think that these goals are *in any meaningful sense* less likely to be achieved when the jury numbers six, than when it numbers twelve. *Ibid.*

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), this Court considered the question whether conviction of crime by a less-than-unanimous jury violated the right to trial by jury in criminal cases. 406 U.S. at 406. The Court examined relevant constitutional history, noting that conflicting inferences could be drawn therefrom, and stated:

> . . . that in determining what is meant by a jury we must turn to other than purely historical considerations. 406 U.S. at 410.

The Court's inquiry then explicitly focused upon the function served by the jury in contemporary society, and the enunciated jury "purpose" of *Duncan* and *Williams* was examined. The Court concluded that "[a] requirement of unanimity . . . *does not materially contribute* to the exercise of this commonsense judgment." *Ibid.* (Emphasis added.)

In view of the "purpose and function" analyses of *Duncan*, *Williams*, and *Apodaca*, appellee suggests that it is appropriate in the instant case to examine the Massachusetts jury procedure to determine whether or not the "essential feature" of the jury is effected. The issue is governmental oppression and whether or not the Massachusetts system, in a meaningful sense, prevents such oppression by the interposition of the commonsense judgment of a body of laypersons between the accused and his accuser.[30]

[30] An examination of the trial *de novo* cases decided in the state courts has provided little assistance. In *Manns* v. *Commonwealth*, 213 Va. 233 (1972), the Virginia court made no examination of history, nor analysis of jury purpose, in its consideration of this question. The court seemed merely to reject the argument that *Callan* v. *Wilson* became applicable to the states via *Duncan* v. *Louisiana*, citing to footnote 30 and the dissent of Mr. Justice Fortas. Also, in *State* v. *Halliday*, 109 R.I. 93 (1971), no examination of history or jury purpose is apparent; rather, the Rhode Island court concluded on the basis of *Duncan*, and *Baldwin* v. *New York*, 399 U.S. 66 (1970), that the "mandate of *Callan* is applicable to the states." 109 R.I. at 103.

Cases decided in federal courts bear only indirectly upon potential governmental oppression and even less directly upon the question of jury purpose. In *Lemieux* v. *Robbins*, 414 F. 2d 353 (1st Cir. 1969) (cited with approval by the court in *State* v. *Sparrow*, 276 N.C. 499 (1970)), the Circuit Court examined the trial *de novo* procedure in the state of Maine on the basis of a challenge deriving from this Court's determination of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). In its opinion, the Circuit Court made the following statement with respect to the practical nature of the *de novo* procedure:

> . . . [A] defendant gives up nothing by going to trial in the district court. Nor, unlike the situation in *Pearce*, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all. [Footnote omitted.] If he does accept it, both he and the state start at parity; should he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity. 414 F. 2d at 355.

Although the statement is not explicitly addressed to the issue of governmental oppression, the appellee suggests that the Circuit Court's observation implicitly contraindicates government oppression in the *de novo* process.

In *Manns* v. *Koontz*, 451 F. 2d 1344 (4th Cir. 1971), the Circuit Court affirmed a federal district court's refusal to grant relief on the basis of a claim that the Virginia *de novo* procedure was violative of *Duncan*. The basis of dismissal seems to have clearly been 28 U.S.C. § 2283 and *Younger* v. *Harris*, 401 U.S. 37 (1971). However, the Court did consider the element of irreparable injury and the prosecutorial-oppressive criteria of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), in reaching its decision. Appellee suggests that the Court's action at least implicitly contraindicates governmental oppression in the Virginia procedure.

[31] In *Callan* v. *Wilson*, 127 U.S. 540 (1888), this Court rejected a hypothetical system based upon the ". . . power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury." 127 U.S. at 555. It is clear that several successive convictions are neither theoretically possible nor actually permissible in the Commonwealth of Massachusetts. The "appeal" and jury trial may be elected immediately by a convicted district court defendant and, as such, should be distinguished from the *possibility* of prolonged litigation which was suggested by this Court in *Callan*.

An examination of the Massachusetts jury system discloses that an accused has an absolute right to a body of laymen whose judgment will stand between himself and his accuser after a preliminary adjudication at which he need do nothing.[31] In fact, the defendant obtains the distinct advantage of being able to discover the prosecution's case without having to disclose his own, while in no way jeopardizing his

right to trial by jury. Although he cannot as of right *waive* a trial at the district court level, *cf. Lemieux* v. *Robbins*, *supra*, at 355, n. 4, he can certainly *avoid* a trial by merely listening to the Commonwealth's evidence without offering his own and, if found guilty, appeal. Or he may simply admit to a finding and then appeal for a *de novo* trial. Therefore, contrary to the situation in *Breed* v. *Jones*, 421 U.S. 519 (1975), it is the defendant's choice as to the amount of his participation in the first proceeding and as to whether he wishes to opt for a second proceeding. On appeal, the District or Municipal Court proceeding becomes a nullity: the appeal "wipes out the lower court action entirely." The defendant then has a second opportunity for acquittal, if he so chooses. *Mann* v. *Commonwealth*, 359 Mass. 661 (1971), at 666.

Admittedly, the *de novo* procedure effects a minimal degree of restriction and, arguably, inconvenience.[32] We see, however, the question as one of oppression, and not of inconvenience: can it be said that the *de novo* procedure materially dilutes the function of a jury when the defendant may listen to the government's case, without disclosing his own, and have, immediately thereafter and of absolute right, the further community participation in the process of adjudication of guilt or innocence and the interposition of commonsense judgment of a group of laymen — and, at the same time have the possibility of immediate acquittal? We suggest that the answer should be in the negative. The function of the jury is preserved.

Appellant asserts that this Court has rejected appellee's theory that the *de novo* system offers a defendant the "full

[32] The Commonwealth justifies the inconvenience by pointing out that the District Courts are designed, in the interest of both the defendant and the Commonwealth, to provide speedier and less costly adjudications than are possible on the second level of the Massachusetts two-tier system. The *de novo* system alleviates the burden in the Superior Court, where the full range of constitutional guarantees is available to all on appeal. *Cf. Colten* v. *Kentucky*, 407 U.S. 104, 114 (1972).

panoply of constitutional rights" as guaranteed by due process. Appellant's Brief, p. 55. However, appellant's reliance on *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), is inapposite. In *Ward*, the defendant faced trial for traffic violations in the first instance before the mayor of the town. The fines imposed for such violations constituted a major portion of the village income. This situation was one "'. . . in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'" 409 U.S. at 60. Within this framework, the court held that the *eventual* offer of an *impartial* adjudication was not constitutionally acceptable. However, in the instant case there is no allegation that an initial adjudication before a District Court judge is not made by an impartial and disinterested tribunal.

C. *The Massachusetts Criminal Jury Procedure Complies with the Fourteenth Amendment's Ban Against "Double Jeopardy."*

The Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784 (1969). This is, appellee acknowledges, a fundamental guarantee. *Id.* at 795. However, as the Court noted in *North Carolina* v. *Pearce*, 395 U.S. 711, 719-20 (1969):

> At least since 1896, when *United States* v. *Ball*, 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. "The principle that this provision does not preclude the Government's

> retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U.S. 463, 465. (Footnote omitted.)

And further:

> Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. *Id.* at 720-21.

This rationale was applied to a two-tier system of criminal justice in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). There the appellant had been convicted of a misdemeanor in the Kentucky two-tier system. On appeal to this Court, the appellant challenged, *inter alia*, the constitutionality of the enhanced penalty he received after conviction at his "second-tier" trial. As to the appellant's double jeopardy argument, this Court stated:

this Court said:

> Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U.S. at 719-720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course,

> the situation in *Pearce*, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea. 407 U.S. at 119-20.

Appellee suggests that, in determining that the imposition of a more severe penalty upon reconviction in Kentucky's two-tier system was constitutionally permissible, this Court held, *a fortiori*, that retrial and reconviction in the Kentucky two-tier system were constitutionally permissible.

In Massachusetts, as was the case in Kentucky, the defendant in a criminal trial "appeals" to the second level of the two-

two-tier system to receive a trial "in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 407 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second-tier is absolute and, at the defendant's behest, the lower court proceedings are "wipe[d] out . . . entirely." *Mann* v. *Commonwealth*, 359 Mass. at 666. See *Colten* v. *Kentucky*, 407 U.S. at 113 n. 7.

Thus, appellee suggests, the Massachusetts *de novo* trial procedure does not violate the double jeopardy ban of the Fourteenth Amendment.

Conclusion.

For the reasons stated above, the appellee suggests that this Court should conclude that the appellant's claim is without merit in that, under Massachusetts procedure, he was afforded a jury trial in compliance with and within the requirements of the Fourteenth Amendment.

Respectfully submitted,*

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*Counsel acknowledges that substantial portions of this brief have been excerpted from the Commonwealth's brief in a related matter, *Costarelli* v. *Massachusetts*, which was prepared by former Assistant Attorney General David A. Mills.

IX. Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment of the United States Constitution, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, Constitution of Massachusetts.

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Title 28, United States Code, Section 1257.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Massachusetts General Laws, Chapter 218, Section 27A:

[Trial by jury of six in certain courts.]

Any defendant in a district court of Berkshire county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Central Berkshire.

Any defendant in a district court of Bristol county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section

twenty-six may appeal and claim a jury of six in the second or third district court of Bristol.

Any defendant in a district court of Essex county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of Essex or the central district court of northern Essex.

Any defendant in a district court of Hampden county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Springfield.

Any defendant in the first district court of northern Middlesex, the fourth district court of eastern Middlesex or the district court of Lowell found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Lowell.

Any defendant in the district court of Marlborough, the district court of Natick, first district court of southern Middlesex, the district court of central Middlesex or the second district court of eastern Middlesex found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of southern Middlesex.

Any defendant in the first district court of eastern Middlesex, the third district court of eastern Middlesex, the district court of Somerville, or the district court of Newton, found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the third district court of eastern Middlesex.

Any defendant in a district court of Norfolk County found guilty of an offense of crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of northern Norfolk or the district court of East Norfolk.

Any defendant in a district court of Plymouth county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Brockton.

Any defendant in a district court of Worcester county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the central district court of Worcester.

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

Any defendant found guilty in any of said district courts, of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such an appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a waiver of any right to a trial by jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of

the superior court has and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes

of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

Massachusetts General Laws, Chapter 278, Section 18.

[Appeals in criminal cases to superior courts; recognizance.]
Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the

appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A.

Massachusetts General Laws, Chapter 278, Section 18A:

[Trial of misdemeanors in Suffolk County or in municipal court of Boston.]
Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve

superior court. When a claim for a trial by a jury of twelve in the municipal court of the city of Boston has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has, and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicable to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly by the supreme judicial court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1975

No. 75-377

RICHARD I. LUDWIG

Appellant

V.

COMMONWEALTH OF MASSACHUSETTS

Appellee

ON APPEAL FROM THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

APPELLANT'S REPLY BRIEF

Robert W. Hagopian
Wrentham, Mass. 02093

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ARGUMENT

I - MASSACHUSETTS' "SUGGESTION" THAT THIS COURT LACKS JURISDICTION OVER APPELLANT'S APPEAL IS PATENTLY WITHOUT MERIT.

In its brief and under a section denominated "Jurisdictional Statement", Massachusetts maintains this Court lacks jurisdiction

over Ludwig's appeal because there is no case or controversy. The basis of this contention is that Ludwig waived his right to a jury trial in his second tier criminal proceedings. From this, Masschusetts argues that Ludwig "has no personal interest in receiving a jury trial, thus raising a serious question as to whether this case comes before this Court as a result of the appellant's interest in the case or as a result of the attorney's interest in obtaining an advisory opinion of this Court as to the constitutionality of the two-tier system". Moreover, Massachusetts asserts that the case is more "'feigned' than actual".

In reply to this argument, insofar that it relates to this Court's jurisdiction, the controversy in question is the sentence of $20 imposed by the District Court of Northern Norfolk Six-

Man Jury.[1] The controversy is a "live" one since payment of the fine has been stayed (App. 2a). Far more important, however, are the collateral consequences which attach to a conviction under G.L. Ch. 90 §24(2). In particular, Ludwig was previously convicted on November 3, 1972 for driving to endanger. If this conviction is sustained and if Ludwig is convicted of any motor violation set forth in Massachusetts' Habitual Traffic Offender statute, G.L. Ch. 90 §22F, before November 3, 1978 or of any two violations before March 11, 1979, his driver's license will be revoked for a

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1 Ludwig's license was revoked under G.L. Ch. 90 §24(2)(b), but has since been reinstated pursuant to the discretion invested in the Registrar under Ch. 90 §24(2)(c). However, the record of his revocation still affects his ability to obtain non-statutory automobile insurance or a job involving driving.

period of four years.[2] Of such a consequence, Justice Powell observed in his concurring opinion in Argersinger v. Hamlin, 407

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2 G.L. Ch. 90 §22F compels the Registrar of Motor Vehicles to revoke the license of habitual traffic offenders for a period of four years, but allows the Registar in his discretion, if hardship exists, to issue a new license on a limited basis one year after revocation. A habitual traffic offender is one who incurs three convictions within a five year period of any of the following offenses, singularly or in combination: 1) driving under the influence of intoxicating liquors or narcotic drugs; 2) operating a motor vehicle recklessly or negligently; 3) making a false statement in an application for a motor vehicle operator's license or for registration of a motor vehicle; 4) leaving the scene of accident without making oneself known; 5) operating a motor vehicle after suspension and 6) operating without a license. The full text of Ch. 90 §22F is set out in the appendix to this reply brief.

U.S. 25, 48 (1972): "Losing one's driver's license is more serious for some individuals than a brief stay in jail."

Although what has been said above is sufficient to dispose of the contention that Ludwig has no personal stake in the outcome of this case, this counsel is constrained to comment briefly on Massachusetts' unsupported allegations concerning his personal interest in this litigation. Since becoming aware of the rule of Callan v. Wilson, 127 U.S. 540 (1888), this counsel has claimed a right to trial by jury in the first instance on behalf of almost every accused who has been charged with offenses carrying heavy collateral consequences upon conviction in a first tier court or where there has existed a close issue of reasonable doubt on the merits of the case.[3]

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[3] In Ludwig's case, conviction in the first tier court carried a mandatory license revocation, G.L. Ch. 90 §24(2)(b). Additionally, there existed a close issue of reasonable doubt.

In either of these situations, this counsel believes that a trial by jury in the first instance was in the best interests of the accused, and as such, he felt compelled by duty as an attorney to assert this right. Where a satisfactory disposition of the criminal charges has not resulted, this attorney has sought state and federal review of the first tier court's denial of a trial by jury. How or why this course of duty should be interpreted as this "counsel's interest alone in obtaining an advisory opinion" - other than to state the proposition - is left unexplained by Massachusetts in its brief. As such, Massachusetts' allegations are not only unjustified but unwarranted.

II - MASSACHUSETTS IS PRECLUDED FROM RAISING ANY WAIVER DEFENSE BY ITS FAILURE TO RAISE THE ISSUE BELOW, BUT EVEN IF IT IS NOT, ITS CONTENTIONS ARE WITHOUT MERIT.

The substance of Massachusetts' waiver argument, insofar as it relates to the merits of the controversy, is that Ludwig

waived his right to complain of his being denied a jury trial in the first tier proceedings by subsequently waiving his right to a jury trial in the second tier proceedings. Although this defense, if indeed it is one, could have been raised below, Massachusetts chose not to present it in the trial court upon Ludwig's bill of exceptions, nor before the Supreme Judicial Court on appeal, nor before this Court in its motion to dismiss for lack of a substantial question.[4] Hence, it should be precluded from raising the issue at this late hour.

Quite apart from this consideration, Ludwig maintains that Massachusetts' waiver defense, whether viewed under state or

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4 Counsel for Massachusetts maintains on page two of her brief that she just recently became aware of this fact. Needless to say, Massachusetts is bound by the conduct of the five attorneys who previously represented it in this matter.

federal law, is without merit. First, it should be observed that the Supreme Judicial Court passed on the subject constitutional issues notwithstanding the fact that Ludwig waived his right to a jury trial in the second tier proceedings. Clearly, the inference here is that as a matter of Massachusetts law, Ludwig was not precluded by his second tier waiver from seeking review of the denial of his right to a jury trial in the first tier proceedings. Cf. Lefkowitz v. Newsome, 420 U.S. 283 (1975).

Secondly, if "substantive federal constitutional law"[5] is applied, the same result must hold. More specifically, Ludwig's relinquishment of his jury trial right in the second tier proceeding was not an intentional or express waiver of his right to federal review of the denial of his motion to dismiss, but rather, in fact, it was designed to preserve his federal claim

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5 Lefkowitz v. Newsome, supra (White dissenting).

against mootnes. Cf. Costarelli v. Massachusetts, 421 U.S. 193 (1975).[6] Indeed, as far as that portion of Ludwig's motion to dismiss which was based on the defense of double jeopardy is concerned, it is difficult to imagine any action short of failure to appeal or a "diliberate by pass" which could be interpreted as a "'break in the chain of events'" to prevent federal review in this Court, Lefkowitz v. Newsome, supra, 290 ftn. 6, quoting Tollett v. Henderson, 411 U.S. 258, 267, (1973). See also Menna v. New York, ___ U.S. ___, Nov. 17, 1975. Accordingly, Ludwig submits that his waiver of a jury trial in the second tier proceedings can in no way be interpreted either under state or federal law as a waiver of his right for state or federal review of his constitutional claims.

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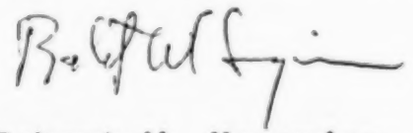
6 Ludwig's second tier trial preceded this Court's decision in Costarelli v. Massachusetts, 421 U.S. 193 (1975).

CONCLUSION

In light of the above, Ludwig submits that Massachusetts' legal contentions are without merit and its unsupported allegations are without justification.

Respectfully submitted,



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02093

APPENDIX

G.L. Ch. 90 §22F reads in part:

A person shall be deemed an habitual traffic offender when records maintained by the registrar show that such person has accumulated the following convictions within a five-year period; provided, however, that when a person who has no prior record of an automobile law violation, as defined in section one of chapter ninety C, is convicted of more than one of the violations referred to in this section, if such offenses all occurred within a six-hour period, such convictions shall for the purposes of this section be treated as a single conviction: 1) three or more convictions, singularly or in combination, of operating a motor vehicle while under the influence of intoxicating liquor, or narcotic drugs in violation of paragraph (a) of subdivision (1) of section twenty-four; operating a motor vehicle recklessly or negligently so that the lives and safety of the public might be endangered; making a false statement in an application for a learner's permit or motor vehicle operator's license or in an application for registration of a motor vehicle; going away without making known his name, residence and the registration number of his vehicle after knowingly colliding with or otherwise causing injury to any person, other vehicle or property, all in violation of paragraph (a) of subdivision (2) of section twenty-four; operating a motor vehicle after suspension or revocation of the person's motor vehicle operator's license or his right to operate motor vehicles in violation of section twenty-three; operating a motor vehicle without a license in violation of section ten; or the commission of any felony in the commission of which a motor vehicle is used; or twelve or more convictions of offenses which are required by any provision of law to be reported to the registrar and for which the registrar is authorized or required to suspend or revoke the person's license or right to operate motor vehicles for a period of thirty days or more, including convictions of the offenses listed above.

. . . . . .

The registrar, after having revoked the license or right to operate

of any person under this section, shall not issue a new license or reinstate the right to operate to such person for a period of four years from the date of revocation, nor until such person has satisfactorily completed a driver improvement course approved by the registrar and has passed such examination as to his competence to operate motor vehicles as the registrar may require; provided, however, that such person may, after the expiration of one year, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the sole grounds of hardship, and the registar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. An appeal to the superior court may be had, in accordance with the provisions of chapter thirty A, from any order of the registrar of motor vehicles made under the provisions of this section.